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Note

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B.

OPINION, JUDGMENT AND FINDINGS OF THE DISTRICT COURT OF SARPY COUNTY, NEBRASKA.

IN THE DISTRICT COURT OF SARPY COUNTY, NEBRASKA.

OFFUTT HOUSING CORPORATION,
Plaintiff,

vs.

THE COUNTY OF SARPY,
Defendant.

DECISION OF THE COURT.

Papillion, Nebraska
June 4, 1954

BY THE COURT: The purpose of asking Mr. Reed and Mr. Entenman to be out here at three o'clock was to announce my decision in the Offutt Housing case. I thought we would probably be through with other matters by three o'clock, but there was a little delay and we did not get completed entirely with the other matters. However, I have gone through and read and re-read the briefs that have been submitted by the parties — rather extensive briefs, incidentally—in connection with this case of Offutt Housing against the County of Sarpy and County Treasurer of Sarpy County, and I do not see that there is much need of delaying my decision any further, as I have had it under advisement for some time. The trial was finally concluded April 20th, then there was some considerable delay in getting all the briefs filed, but they have been in my possession quite a while and I have read them and studied the cases cited and arguments of counsel.

So as not to keep anybody in suspense about my decision, I am going to find for the plaintiff; but I do want to some extent review the basis of my finding.

I have not prepared a journal entry, and expect that plaintiff's counsel will prepare one, probably, in conjunction and after consultation with the County Attorney, or at least submit it to him for approval before it is finally signed.

The situation to begin with concerns a petition for a declaratory judgment. I think that it is entirely proper to file it as such, and a declaratory judgment can properly be entered even though it does involve a question of enjoining the collection of taxes; and the fact that we have a Nebraska statute that says that you shall pay taxes under protest and seek to recover them back after having been denied relief on a claim to the Board of County Commissioners, I don't think takes it out of the category of issues to which declaratory judgment can apply so as to prevent the declaratory judgment chapter from being applicable to the controversy presented here, and the mere fact that the law does provide for paying taxes under protest, filing a claim with the county board for refund and having that denied and appealing in order to get relief from the tax would not preclude the application of the declaratory judgment law. Neither do I think that there is a defect of essential or indispensable parties to this action. Perhaps if the mortgagee had been made a party defendant they might have been in here making some showing in opposition to the tax, or they might have on the other hand said, "We don't want to have anything to do with it," disclaim any interest in it; but I don't think they are such an essential party as would constitute a defect of parties that would prevent the Court from going ahead and passing on the issues. The issue here is really between Sarpy County and the county tax collector, the

county treasurer, on the one hand, and the plaintiff, who is called upon to pay the taxes, if rightly assessed, on the other hand, rather than the mortgagee, who certainly wouldn't be paying this alleged tax; and the fact that the state is not made a party, I do not think is a fatal defect. If the state had to be a party here, we would have to find some special statute that would permit joining the state, because they have not consented to the suit and hence can hardly be an essential party, and I do not think that there is a material defect of indispensable parties that would prevent the Court from passing on the controversy presented.

Then we come to the actual merits of the controversy. In my opinion I do not think there is any question here but what exclusive jurisdiction was ceded by Nebraska to the United States Government on the additional land site that was acquired as a part of Offatt Air Base upon which to accommodate at least a part of this housing project, the rest of it being on other land constituting part of the original Offutt Air Force Base, but it is within the military reservation and exclusive jurisdiction has been ceded by Nebraska to the United States Government; that exclusive jurisdiction, of course, precludes the power and right of levying and collecting taxes, unless consent by Congress to taxing the property has been given.

Now, the situation here also raises the question of whether you classify Offutt Air Force Base a part of the public lands of Nebraska; I mean that is one of the things we are asked to have a declaration on. You certainly do not so classify it unless you are going to depart entirely from the unbroken line of U. S. decisions to the contrary; a permanent military base is not a part of the public lands; that applies only to lands remaining for disposition. That conclusion seems uniform in the decisions. So, in attempting to tax improvements on the

Offutt Air Force Base, as improvements on public lands and make it fit Section 77-1209 of our statutes it just don't quite fit, because Offutt Air Force Base is not a part of the public lands as defined by the adjudicated cases, an unbroken line of decisions cited in plaintiff's brief. Surely that section covers the school lands in Nebraska without question, and that is where most of your taxes under that section of the statute are assessed; those school lands remain for sale and disposition; but that statute would not permit you to levy taxes for instance upon some private property on Offutt Air Force Base, or any other permanent military installation which had been set apart from public lands and no longer is public lands subject to disposition or sale.

That brings us to the question of whether or not there has been any consent to tax given by Congress. Here we have two different types of property involved. The tax schedule for the year 195[illegible] lists some appliances and some office furniture on the personal tax schedule, in another place it lists improvements on leased ground, and refers to another place in the same schedule as apartment houses. Under the terms of the lease in question the actual legal title to the apartments, the dwelling units, the buildings themselves, is in the United States Government, exactly the same as it is on the land, so that as far as taxing the apartment houses, the buildings themselves, that would be directly taxing United States Government property; as far as taxing the improvements on leased ground, you would be attempting to tax United States Government property—to me that seems plain—and you have a clear distinction between that situation and the *Meade Heights* case in Maryland, which was just exactly the contrary; by the specific terms of that lease the buildings thereon remained the property of the Meade Heights Corporation, and so remained—with the privilege of re-

moval thereof at the termination of the lease, and did not become the property of the United States Government; so that as far as the *Meade Heights* case being authority for taxing the improvements consisting of the housing units on Offutt Air Force Base, not only do you find that distinction where the Meade Heights buildings belonged to Meade Heights, Incorporated, a private corporation, with the privilege of removing them if they were still there at the end of 75 years, the termination of the lease, but you, of course, also had a quite different provision in the constitution and statutory law of Maryland, which we don't seem to have here, that expressly provided that the State of Maryland had the right to tax property of the United States government wherever possible and to the fullest extent, rather than foregoing any right to tax leasehold interests in real estate by express statutory provision; and to me the *Meade Heights* case is no precedent to follow here because in the first place we do not have the same statutory law as Maryland did granting authority to the fullest extent possible to tax property of the United States Government; and secondly the lease there involved was apparently the forerunner and predecessor of this one, on which there has undoubtedly been some studied effort to avoid situations just like Maryland where the property was not the United States Government's property at all, but was the property of the private corporation, and as such held to be taxable, but at the same time recognizing that the land on which it was situated was not taxable because it belonged to the United States Government; and even notwithstanding the stronger Maryland statutory provision, that did not permit the state of Maryland there to tax the ground on which it was situated. In fact, the controversy seemed to be whether or not they should tax the full interest in the value of the buildings, because of restrictions on occupancy, etc.

The Florida case—also cited on behalf of defendants—of course involves a similar lease in a back-handed way, but that was a sales tax on the building materials that went into the project. Neither does our case conform to the *Tampa Bay Gardens Apartment* case in Florida, which was a housing rental tax, not an ad valorem property tax. For all we know maybe the ad valorem property tax in Florida is so insignificant as not to justify litigation when compared to the housing rental tax imposed. Florida also collected a sales tax on the materials and may even have an income tax which they may assess on the income from the apartments so that they get two or three cracks at taxing under their statutory provisions that we do not have in Nebraska.

With reference to the apartment houses, the buildings, the physical improvements themselves, it seems to me that definitely they are property of the United States Government, and are beyond the power of Sarpy County to tax as such. If the apartment houses are considered as improvements on leased ground I am purposely not making any commitment as to whether there might be some taxable leasehold interest. If our law permits the taxing of the value of a lease held by an individual, that, in my opinion, is the very most that Congress has given any consent to tax, if they have given any consent at all under the Wherry Housing Act. As brought out in defendant's reply brief, the provision in the 1947 act with reference to the leasing of real or personal property of the United States Government in any one of the branches of the service for a five year period, or whatever duration the secretary of the particular service concerned concluded, specified that it must be such as was determined not to be surplus, because if it was determined to be surplus of course it would be sold by the secretary—of the Air Force, for instance—in the particular case in

which he had jurisdiction, and for the time being was not needed for a public use. That was the character of property to which in that Act express consent was given that the interest of the lessee of that character of property shall be made subject to state and local taxation.

And, now, what do we have here? We have United States Government property, not that is surplus property being sold and disposed of completely as surplus property, not needed for public use, but we have United States Government property that is being devoted to a public use for the housing of military personnel, and is certified to be needed for that purpose; not certified not to be needed for a public purpose; so that in my mind, without making any definite commitment now, there would be a serious and doubtful question as to whether there ever was any consent given to tax a leasehold interest in this particular property, where it is being devoted to a public use for housing of military personnel, under the provision of the 1947 act that pertained to the consent being given to make the lessee's interest taxable where it was not needed for a public use for the time being; and that is the only consent that can be pointed to. Sure! the *Meade Heights* case says that language of the act is plain; and as far as the *Meade Heights* case is concerned it was plain enough, because the *Meade Heights* involved the assessment of physical improvements, buildings, that belonged to somebody else, not the Government at all, they belonged to the Meade Heights Corporation.

The Florida case, involving the sales tax, indicates it doesn't find too much difficulty in that consent section being plain language and that it doesn't need any construction; yet so far as fitting the facts of the Florida case to our case, they just do not fit at all; that case involved a sale tax on materials that went into the con-

struction before the building was ever built. They say the building became for all practical purposes not a Government building, but a privately owned building held by private enterprise for private gain; but to what extent is that anything more than dicta of the Florida Supreme Court so far as an ad valorem property tax is concerned. Maybe our court will say the same thing, but I doubt it very much.

The personal property items here, consisting of office furniture and appliances, are admittedly owned by the plaintiff, Offutt Housing Corporation; they are physically located within military reservation, and in my opinion the construction of the consent statute—of the consent section of the statute involved—certainly cannot be extended to include such property because that property is not even owned by the United States Government. What consent was being granted? Consent to lease Government owned real and personal property. That is the consent that you are talking about in that section of the 1947 Act pertaining to the leasing of real and personal property of the Government. The Government never owned the appliances. The Government never owned Offutt Housing Company office furniture and cash register and desk, that are listed at $205.00 on the tax schedule; so that the matter of giving consent to taxing of leased personal property would not be applicable to the personal property involved in this case at all, if there is by proper construction a consent of Congress even granted.

This brings us down to the point that so far as personal property is concerned it is privately owned personal property physically located upon a permanent military base, Offutt Air Force Base, and I cannot see that there is any reason why the Court should follow a state court decision such as the Maryland case instead of adhering to the last

pronouncement of the United States Supreme Court on this question. The U. S. Supreme Court seems to be quite consistent in holding that private personal property located upon and within a permanent military base is beyond the jurisdiction of the state to tax, as held in *The Surplus Trading Corporation* v. *Cook* case. Admitting it to be privately owned personal property, individual property, located within the confines of the military installation over which the State had ceded exclusive jurisdiction to the United States Government, and in the absence of finding express consent by Congress to tax the privately owned personal individual property of Offutt Housing Company, a corporation, physically located within the confines of the military base, I do not think the State or Sarpy County has authority to tax it, because so far as that property is concerned it has been placed beyond the power to tax without consent and by no construction that I can find of the consent section of the 1947 act, or any subsequent Act, has consent been given to tax other than the interest of the lessee in real or personal property of the United States that is leased as not now being needed for a public purpose; so that certainly wouldn't be applicable to the personal property involved in this matter here.

In going through the various sub-paragraphs of the prayer of the plaintiff's amended and supplemental petition my decision will encompass granting the specific relief asked in each one of those subparagraphs, because there is no place in any of them that asks this Court to determine and declare whether or not a leasehold interest in Nebraska or in the housing project in question is a taxable item of property; that is not sought to be determined here, and I do not want to preclude myself, or preclude the parties, from such being a potential question for future determination. The mere fact that in a life lease, which we refer to as a life tenancy, that under the law in Nebraska it is the

obligation of the life tenant to pay the taxes on the fee title to the property wouldn't necessarily control if it was a lease for a term less than life, such as a term of years, even if it was 99 years, or 75 years, so far as such lease representing separate property of value subject to taxation apart from the fee title. Before the termination of the lease you have an item of property, probably, that does represent some value, even when you have a one year lease on a farm, there is some value to your lease. Whether that is an item of property that the Nebraska statute contemplates could be segregated for taxes, or whether a 75 year lease on an apartment building, or office building, could be segregated for taxes is not determined; merely that it isn't done doesn't necessarily mean that it couldn't be done; or merely because it would become a complex problem to figure out the proper value for such lease wouldn't necessarily mean it isn't an item of taxable property; yet in my view that question is not presented here and is not being passed upon; and certainly by no stretch of reasonable construction can the listing of improvements on leased property, or the listing of apartment houses, as was done on the 1952 personal property tax schedule return by the assessor for the plaintiff in this case, be properly construed to be returning for taxation the value of a leasehold interest therein. It is attempting to tax the improvements themselves, which I say you can not do because they belong to the United States Government and that has removed them beyond the field of Sarpy County to tax without consent, and I am not making any commitment as to whether or not Sarpy County could tax the value of a leasehold interest in something to which possibly Congress has consented; I do not know what the value of such leasehold interest would be, but that is something that does not have to be passed upon at this time in order to decide the issues in the case presented, and I think the granting of the

relief in each of the sub-paragraphs in plaintiff's petition doesn't necessarily pass on that question, because that is not even sought to be ruled upon.

You can prepare a decree accordingly, Mr. Reed and Mr. Selling, and submit it to Mr. Entenman; but the gist of my holding is that the controversy does represent a justiciable issue between the parties that is cognizable in this court and on which a declaratory judgment can be entered, and that there is no defect of parties that prevents the Court from entering a judgment, and that the attempt to tax improvements on leased property, or apartment houses, comprising the dwelling units at Offutt Air Force Base is an attempt to tax property the title to which is in the United States of America and there has been given no consent by Congress to taxing the land or the improvements thereon, or the apartment houses thereon, whichever you want to say, as such, and that so far as the appliances are concerned, and the office furniture also listed on the same personal tax schedule for taxation, that they are privately owned property of the plaintiff corporation without dispute, and they are within the military confines of the Offutt Air Force Base and there has been no consent given by Congress to tax the privately owned property of Offutt Housing Corporation within the physical confines of the military base; so that in effect the plaintiff has prevailed in this litigation, and I frankly state that the matter is difficult, and it has been confusing, and I am only happy for Sarpy County that it isn't a matter where they have had this item of valuation on the tax books for two or three million dollars for the last ten years and would now be losing it from the tax rolls. This is something you never had on the tax books before; certainly it isn't representing the character of loss as if you had it on the tax books and found that it was deeded to a charitable or educational institution out from under you and you would lose that much

valuation. To me it is just a question of the exclusive jurisdiction having been granted and ceded to the United States of America and there has to be consent of Congress before you can tax; and that there is not consent of Congress to tax any one of the items listed on the schedule involved; there has been no consent whatever to tax improvements on leased property, or to tax privately owned chattel property of Offutt Housing Company; the only consent would pertain to the consent to tax a leasehold interest in property that was not surplus and for the time being not needed for public use, and that is the limit of the consent that has been given; and of course you can't rely upon the consent to tax if this property ever becomes vested in the name of the FHA Commissioner, that is something that doesn't currently prevail, and you would have to cross that bridge when the time came and the FHA Commissioner became vested with the title, which isn't the circumstances as they exist in this case at the present time. The fact that the Attorney General of Florida says they have had no difficulty in all four or five Air Force bases in Florida on which there are similar housing projects, not even an attempt made to question the *ad valorem* property tax, that has been levied on similar housing units, doesn't necessarily in my mind mean that they do not have a right to resist it; for all we know, as I say, it may be of such insignificance, a nominal amount, that it isn't even worth litigating as compared to the fact that they do have other forms of taxes which obviously do reach substantial value in those kind of projects, one of them being disclosed by this Tampa Bay Gardens Apartment proposition where they proposed and made stick a housing rental tax; maybe they taxed the income too, I don't know whether Florida has an income tax law or not.

One other case that I know Mr. Entenman has specifically mentioned is the Minnesota case, which is a United States

Supreme Court decision, but that case does not fit at all, in that there you have a Government piece of property that is what you might compare to surplus property being disposed of, it had been sold to a private individual and the government retained the naked legal title for security purposes. This property has not been sold by the United States Government, it is going to belong to the United States Government from on out, unless there is a default in the mortgage. The property involved in the Minnesota case was surplus, at least it would be analogous to surplus property the government didn't need for anything, and they went ahead and sold it to a private individual, who was using it himself and to the extent that he had the beneficial ownership of it, the property was subjected to taxation as the Government retained only the naked legal title as security for the payment of the balance of the installments as they became due on the purchase price; that was held to be perfectly proper, that it be taxed by the state of Minnesota; I do not think that is analogous to our situation in the instant case. So far as the security of our mortgage is concerned it is more comparable to the revenue bonds that are issued against a public utility; the lines and poles, the physical items, if you salvage them, they wouldn't be worth five cents on the dollar as security for your bond issue, but your security for the bond issue is the income or revenue the property produces; and that is exactly the real character of the security they have for this mortgage on Offutt Housing Project—not the physical property itself, because that belongs to the Government; the mortgagee as a practical matter will have to rely upon the income from that property to pay off the mortgage, and if it fails to do so then the FHA Housing Commissioner is going to take it over.

Mr. Entenman: But the power of sale is there.

By the Court: Yes, that is true.

Mr. Entenman: And that word "Sell" is in all those acts.

By the Court: And when the time comes the FHA Commissioner is obliged to take it over, then is when the provision of taxable the same as any other property will come into play, into being; it doesn't pertain to this case at all so far as Offutt Housing Corporation's obligation to pay on the mortgage that it has given. It is a matter where its obligation is really limited to the revenue it gets off of that property, isn't it? as the only source of income from which it is going to pay the installments as they become due on that mortgage.

Mr. Reed: Only security.

By the Court: That is the only substantial security for that mortgage. Just like if you would float a bond issue on the Nebraska City Utilities; there isn't very much security to the poles and the lines if you tore them down and sold them; they wouldn't bring five cents on the dollar; the bond issue is based upon the revenues that are being produced by that utility as a going concern; that is the practical angle.

Mr. Entenman: That might be the practical angle; but legally you don't mean to say the Manufacturers Trust took a five million dollar mortgage here without the right to ever acquire that property?

By the Court: No, not without the right to ever acquire it, but I say their principal security and source of receiving payment isn't the bricks and buildings over there; their principal security and source of receiving payment is the rents from that housing project, just like the source of payment on the bond issue of the Nebraska City Utilities is the income that it produces, not the salvage value of a pile of poles and wires.

(Followed by general off the record discussion between Court and counsel.)

CERTIFICATE:

I, Roy J. Peterson, Official Court Reporter of the Second Judicial District of Nebraska, do hereby certify that the above and foregoing is a true and correct transcript of my notes taken of the proceedings had in the above entitled matter; the same having been recorded by me in shorthand at said time, and thereafter extended by me into typewritten longhand as above set forth.

Dated this 10th day of June, 1954.

/s/ ROY J. PETERSON,
Official Court Reporter of the Second Judicial District of Nebraska.

(Note: The foregoing opinion was rendered by Judge John M. Dierks.)

IN THE DISTRICT COURT OF SARPY COUNTY, NEBRASKA.

OFFUTT HOUSING COMPANY, A Corporation, *Plaintiff*, *vs.* COUNTY OF SARPY and ROBERT M. EBY, Treasurer of County of Sarpy, Nebraska, *Defendants.*	Doc. U. Case No. 6685. Page 350.

JUDGMENT AND DECREE.

Now on this 15th day of June, 1954, the same being one of the days of the May 1954 term of court, this cause came on to be heard on the amended and supplemental petition of the plaintiff, the answer of the defendant, Robert M. Eby, the amended answer of the defendant, County of Sarpy, and the plaintiff's reply to the amended answer of the defendant, County of Sarpy, and the evidence, and was submitted to the court, and the court being fully advised in the premises finds generally for the plaintiff and against the defendants, and each of them.

After due consideration of the evidence, the court finds:

That the allegations contained in plaintiff's amended and supplemental petition are true.

That the allegations contained in paragraphs III, X, XII, XV and XVI of the amended answer of the defendant, County of Sarpy, are true and that the allegations contained in paragraphs VI, VII and VIII of plaintiff's reply to amended answer of defendant, County of Sarpy, are true and that the deed filed on April 12, 1950 and recorded in Deed Records 67 at page 537 in the office of

the Register of Deeds of Sarpy County, Nebraska, was executed by the grantor named therein on the 21st day of October 1949.

The court further finds:

That the court has jurisdiction of the subject matter of the action.

That the court has jurisdiction over the parties to this action.

That the controversy between the parties is justiciable in this action.

That there is no defect of essential parties.

The court specifically finds:

That Offutt Air Force Base is a military reservation of the United States and it has, at all times herein involved, been actively and exclusively used as a purely military installation.

That the Department of the Air Force has certified Offutt Air Force Base to be a permanent part of the United States Air Force and that the Secretary of the Air Force, previous to the erection of the housing units involved, certified that such housing project was necessary for the use of personnel assigned to Offutt Air Force Base.

That all property involved is located on Offutt Air Force Base.

That the land on which Offutt Air Force Base is located is real property of the United States.

That the rental units involved were needed at Offutt Air Force Base and that the rentals therefor are substantially less than the rentals for comparable private available housing.

That the project was initiated by the Commanding Officer of Offutt Air Force Base determining the rental housing need for its military personnel, the later approval of the

project by the Secretary of Air, followed by determination of project details by the Air Force and the Federal Housing Administration, after which prospective sponsors were invited to provide the approval number of rental housing units, after which Carl C. Wilson, Inc., one of four prospective sponsors, was selected, Carl C. Wilson, Inc. not being the preference of the Commanding Officer of Offutt Air Force Base. Thereafter, in accordance with existing law and Federal Housing Administration regulations, the sponsor caused the plaintiff corporation to be organized to act as lessee for the military rental housing project.

That the housing project was conceived and planned and that the additional necessary land was secured through the Omaha Chamber of Commerce before any sponsor or lessee was selected or established.

That the maximum rentals to be paid by the occupants of the housing project were determined on the basis of the ability of prospective military tenants to pay, and that before the sponsor of the project was selected, the prospective lessee, the plaintiff, was required to conform to the rental schedule prescribed by the Department of the Air Force of the United States of America.

That the amount of rentals which the plaintiff may charge for occupancy of the housing units involved was fixed by the Federal Housing Administration Commissioner in accordance with Title VIII of the federal National Housing Act and the regulations of the Federal Housing Administration Commissioner with concurrence of the Department of the Air Force of the United States of America.

That the rentals to be paid by the occupants of the rental housing units in said project cannot be raised without the consent of the Department of the Air Force of the United States of America.

That the housing units and the equipment involved is presently leased only to military personnel of the United States of America assigned to duty at Offutt Air Force Base.

That the amount of rentals charged to the occupants of the rental housing units were fixed upon the assumption that the property was not taxable and that, in the event the property involved in this action should be found to be taxable, rentals paid by Air Force personnel tenants will be increased.

That the eligibility of Air Force personnel to rent the property involved is determined by the Strategic Air Command Base Commander.

That the property involved is not located in any municipality or school district.

That upon receipt by Governors of the State of Nebraska of notification letters, copies of which were introduced in evidence as Exhibits 2 and 2-A, the United States of America assumed exclusive jurisdiction over Offutt Air Force Base and over all property involved in this action, and that upon receipt of such notification letters, the State of Nebraska, and its political subdivision, County of Sarpy, ceded all taxing jurisdiction over Offutt Air Force Base to the United States of America and all property located thereon.

That the United States of America has never by legislative action consented to the defendant, County of Sarpy, taxing the buildings involved in this action or the appliances and personal property of the plaintiff located therein.

That the United States of America has never by legislation action consented to the defendant, County of Sarpy, taxing any tangible personal property of the plaintiff located on Offutt Air Force Base.

That the mortgage executed by the plaintiff is not a mortgage on the fee title to the land leased to the plaintiff.

That on June 23, 1952, the rental housing units involved in this action were fully completed and that all 611 rental housing units involved therein had been certified as ready for occupancy and that on said date, a large number of such rental units were already occupied by Air Force Personnel assigned to Offutt Air Force Base.

That in connection with the plaintiff being established as lessee of the rental housing project on Offutt Air Force Base and being granted a lease of the land on which the project was to be erected, the Department of the Air Force required the plaintiff to agree that the rentals paid by the tenants of the rental housing units should include the use of household appliances to be furnished by the plaintiff, including gas ranges, refrigerators, washers and dryers.

That on March 10, 1952, a number of the buildings and rental housing units therein had been fully completed and were occupied by Air Force personnel assigned to Offutt Air Force Base and that on said date, all of the buildings had been structurally completed, except for some remaining painting, plastering and plumbing connections in some of the rental housing units contained therein.

That the plaintiff, in 1952, did not list with the County Assessor of Sarpy County any property involved in this action as personal property of the plaintiff subject to taxation in Sarpy County and that on June 23, 1952, the County Assessor of the defendant, County of Sarpy, without plaintiff's consent or authority, executed a purported "Business and Professional Schedule of Personal Property," purported to be owned by the plaintiff and subject to taxation in Sarpy County as personal property

of the plaintiff and that the property described in such Business and Professional Schedule is the property involved in this action.

That said schedule listed under subdivision F thereof miscellaneous personal property at a valuation of $205.00 and household appliances at a valuation of $69,695.00 and that in such schedule in subdivision I thereof, there was listed "Improvements on leased land" at a valuation of $755,785.00.

That the improvements were assessed at the assessor's estimate of the value of the buildings, the same as if the plaintiff had a full and unqualified ownership of the buildings.

That on the basis of such schedule, purported taxes were levied against the plaintiff in the amount of $10,783.45. That $9,870.55 of such tax covers improvements on leased land at Offutt Air Force Base and balance of the tax, or $912.90, covers taxes levied against the plaintiff on property listed under subdivision F of such "Business and Professional Schedule of Personal Property."

That no part of said taxes have been paid.

That prior to the bringing of this action, the defendant, Robert M. Eby, Treasurer of the defendant, County of Sarpy, by a letter dated April 13, 1953, threatened to issue a distress warrant to collect the purported taxes involved.

That plaintiff is entitled to the relief prayed for.

THEREFORE, IT IS DECLARED, DETERMINED AND ADJUDGED THAT:

Offutt Air Force Base is property reserved or acquired and used by the United States for military purposes.

The State of Nebraska and its political subdivision were, in 1952, and thereafter, without power or authority to tax tangible property located at or upon Offutt Air Force Base.

Offutt Air Force Base, the land on which it is located, and rental housing improvements thereon were, on June 23, 1952, and at all times thereafter, property of the United States, not subject to taxation by the State of Nebraska or Sarpy County.

On June 23, 1952, and at all times thereafter, rental housing improvements on Offutt Air Force Base were real estate and not personal property and was a part of the land on which Offutt Air Force Base is located.

The land on which Offutt Air Force Base is located was not, during any time during 1952, a part of public lands.

The purported 1952 assessment of "Improvements on leased lands * * * $755,785.00" as personal property of the plaintiff was illegal, null and void and of no effect.

The purported 1952 levy of taxes against the plaintiff by the defendant on improvements on leased land of the purported value of $755,785.00 was illegal, null and void and of no effect.

The purported property of the plaintiff listed under Schedule F of the purported personal property tax schedule as property subject to taxation in Sarpy County under the laws of the State of Nebraska was illegal, null and void and of no effect.

The purported property of the plaintiff listed under Schedule F of the purported personal property tax schedule as property subject to taxation in Sarpy County, Nebraska, was located on Offutt Air Force Base and was not subject to taxation by the defendant, County of Sarpy.

The purported 1952 levy of taxes against the plaintiff on the property listed in Schedule F of the purported personal property tax schedule was illegal, null and void and of no effect.

The purported personal property tax schedule made by

the County Assessor of Sarpy County showing personal property of the plaintiff subject to taxation in Sarpy County under the laws of the State of Nebraska should be corrected to eliminate therefrom improvements on leased land of the valuation of $755,785.00.

The purported personal property tax schedule made by the County Assessor of Sarpy County showing personal property of the plaintiff subject to taxation in Sarpy County under the laws of the State of Nebraska should be corrected to eliminate therefrom property listed in Schedule F thereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT:

The defendant, County of Sarpy, its officers and agents, be perpetually enjoined from including in its tax assessment schedules any rental housing improvements on Offutt Air Force Base as personal property of the plaintiff in Sarpy County.

The defendant, County of Sarpy, its officers and agents, be perpetually enjoined from including in its tax assessment schedules any furniture, fixtures, tools, equipment or household appliances located on Offutt Air Force Base as personal property of the plaintiff taxable in Sarpy County.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant, County or Sarpy, its officers and agents, and the defendant, Robert M. Eby, Treasurer of Sarpy County, be perpetually enjoined from levying any tax against the plaintiff covering improvements located on Offutt Air Force Base or enforcing any tax thereon against the plaintiff.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, County of Sarpy, its officers and agents, and the defendant, Robert M. Eby, Treasurer of Sarpy County, be perpetually enjoined from levying any tax against the

plaintiff covering furniture, fixtures, tools, equipment or household appliances located on Offutt Air Force Base.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the purported personal property tax schedule made by the County Assessor of Sarpy County on June 23, 1952 be corrected to eliminate therefrom improvements on leased land of the valuation of $755,785.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the purported personal property tax schedule made by the County Assessor of Sarpy County on June 23, 1952 be corrected to eliminate therefrom furniture and fixtures—tools and equipment—household appliances of the valuation of $69,900.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff recover from the defendants its cost in this action taxed at $28.35.

BY THE COURT

/s/ JOHN M. DIERKS,
Judge.

C.

OPINION AND JUDGMENT OF THE SUPREME COURT OF NEBRASKA.

OFFUTT HOUSING COMPANY
vs.
COUNTY OF SARPY
} 33658

Filed May 6, 1955.

1. The levy, assessment, and collection of taxes which are demonstrably void for want of jurisdiction or authority to impose the same may be enjoined.

2. Generally, the state's immunity from suit in its own courts without its consent is unaffected by declaratory judgment statutes, but such an action may be maintained under statutes which permit actions against the state.

3. By the enactment of Title 12, U. S. C. A., section 1748d, and other statutes in pari materia therewith, the Congress of the United States has receded to the state the power and authority to tax a lessee's interest in a housing project located on real property owned by the government of the United States which has been leased by it to private industry for the construction, maintenance, operation, and rental of military housing units by the lessee for its own use and profit.

4. The meaning of the words "public lands" varies in different statutes enacted for different purposes, and they should be given such meaning in each as comports with the intention of the Legislature in their use.

5. The term "leased public lands" as used in section 77-1209, R. R. S. 1943, for purposes of taxation, means "lands belonging to the public, which have been leased as authorized by law."

6. Also, the words "owner of such improvements" as used in section 77-1209, R. R. S. 1943, for purposes of taxation, include "any lessee who has the dominion or control thereover for his own use and profit during the useful life thereof."

Heard before Simmons, *C. J.*, Carter, Messmore, Yeager, Chappell, Wenke, and Boslaugh, *JJ.*

CHAPPELL, *J.*

Plaintiff, Offutt Housing Company, a corporation, brought this action against defendants, County of Sarpy and Robert M. Eby, its county treasurer, seeking a declaratory judgment determining that a 1952 tax levy and assessment made by the county upon plaintiff's personal property located within the Offutt Air Force Base was void; to enjoin collection thereof; and to permanently enjoin any levy and assessment of taxes thereon. After trial upon the merits, a judgment was rendered which found and adjudged the issues generally in favor of plaintiff and against defendants, and awarded the relief sought by plaintiff. Defendants' motion for new trial was overruled and they appealed. Numerous errors were assigned, the effect of which was to assert that the judgment was not sustained by the evidence but was contrary thereto and contrary to law. We sustain the assignments.

At the outset we are met with defendants' contention that by reason of section 77-1727, R. R. S. 1943, plaintiff could not maintain injunction. In *Hemple* v. *City of Hastings*, 70 Neb. 723, 113 N. W. 187, it is said after referring to cited cases and such section: "It was settled that, where a tax is void, i.e., where there is no tax which the plaintiff is in equity bound to pay, he may invoke the aid of a court of equity to protect his rights by injunction, notwithstanding such provision. *Earl* v. *Duras*, 13 Neb. 234; *Bur-*

lington & M. R. R. Co. v. *Cass County*, 16 Neb. 136; *Touzalin* v. *City of Omaha*, 25 Neb. 817; *Bellevue Improvement Co.* v. *Village of Bellevue*, 39 Neb. 876." Other comparable Nebraska cases too numerous to cite here are cited and comprehensively discussed in *Mid-Continent Airlines* v. *Nebraska State Board of Equalization & Assessment*, 105 F. Supp. 188. As indicated therein, this court has uniformly upheld the right to enjoin taxes which are demonstrably void for want of jurisdiction or authority to impose the same, as distinguished from those which are not void but simply irregular or erroneous. We conclude that the remedy of injunction is available, provided the evidence and applicable law warrants its employment.

Relying solely upon section 25-21,159, R. R. S. 1943, defendants also argued that the state was a necessary party defendant, thus there was a defect of parties. We conclude that the contention has no merit. No claim is made in this case that any statute is unconstitutional, requiring opportunity for the Attorney General to be heard. As stated in *Northwestern Mutual Life Ins. Co.* v. *Nordhues*, 129 Neb. 379, 261 N. W. 687: "Section 22, art. V of the Constitution provides: 'The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought.' Under this provision no suit can ordinarily be maintained unless authorized by legislative provision. The state cannot be sued in its own courts without its consent. *State* v. *Mortensen*, 69 Neb. 376; *McShane* v. *Murray*, 106 Neb. 512; *McNeel* v. *State*, 120 Neb. 674; *Eidenmiller* v. *State*, 120 Neb. 430."

Section 24-319, R. R. S. 1943, waived that prerogative in some respects, but this action does not come within its purview. It has been held that: "Generally, an action for a declaratory judgment cannot be maintained against the state without its consent, the state's immunity from suit

being held unaffected by declaratory judgment statutes; but such an action may be maintained under statutes permitting various actions against the state." 81 C. J. S., States, s. 214, p. 1304, and authorities cited. It has also been held that: "Ordinarily, general rules as to proper and necessary parties in civil actions apply in taxpayers' suits." 30 C. J. S., Counties, s. 291, p. 1244.

On the other hand, as provided in section 23-101, R. R. S. 1943: "Each county, established in this state * * * shall be a body politic and corporate * * * and by that name may sue and be sued, plead and shall be impleaded, defend and be defended against, in any court having jurisdiction of the subject matter, either in law or equity, or other place where justice shall be administered." No exception thereto is operative herein. This court has uniformly entertained jurisdiction in cases brought to enjoin the collection of void taxes wherein only the county in which the property is located and the county treasurer thereof have been made parties defendant. *Rothwell* v. *Knox County*, 62 Neb. 50, 86 N. W. 903; *Y.M.C.A. of Omaha* v. *Douglas County*, 60 Neb. 642, 83 N. W. 924, 52 L. R. A. 123. See, also, 28 Am. Jr., Injunctions, s. 275, p. 450.

In 1949 Congress enacted Chapter 403, Public Law 211, generally referred to as the Wherry Housing Act. As amended, it now appears as Title 12, U. S. C. A., section 1748 to 1748i. The primary purpose of the legislation was to procure the construction, operation, and maintenance by private industry of adequate housing facilities for rental to civilian and military personnel of the army, navy and air force. The main impetus for such construction was supplied by provisions of the act which authorize the Federal Housing Commissioner, after appropriate certification of necessity as a permanent part of a military establishment with no intention to substantially curtail activities thereat,

insure a first mortgage on real estate in fee simple or a leasehold for an amount generally not to exceed five illion dollars, and not to exceed 90 percent of the re-acement cost of the property or project when completed.

Section 1748d, insofar as important here, provides that: Whenever the secretary of the * * * Air Force determines at it is desirable to lease real property within the mean-g of sections 626s-3 to 626s-6 of Title 5, * * * to effectu-e the purposes of this subchapter, the Secretary con-rned is authorized to lease such property under the au-ority of sections 626s-3 to 626s-6 of Title 5, * * * upon ch terms and conditions as in his opinion will best serve e national interest without regard to the limitations im-osed by said sections in respect to the term or duration the lease, and the power vested in the Secretary of the epartment concerned to revoke any lease made pursuant said sections in the event of a national emergency de-ared by the President shall not apply. Whenever the ecretary of the * * * Air Force determines it to be in the terest of national defense, he is authorized to sell, trans-r, and convey at fair value (as determined by him), for e under this subchapter, all or any right, title, and in-rest in any real property under his jurisdiction, *not-ithstanding any limitations or requirements of law with spect to the use or disposition of such property. The uthority conferred by this section shall be in addition to nd not in derogation of any other power or authority of the ecretary of the * * * Air Force.*" (Italics supplied.)

In that connection, section 1748f, also provides: "Noth-g in this subchapter shall be construed to exempt any al property acquired and held by the Commissioner under is title from taxation by any State or political subdivision ereof, to the same extent, according to its value, as other al property is taxed." Such section is not controlling

under the factual situation presented in the case at bar, but it does have application, to be considered as a circumstance in connection with others, indicating the intent of Congress that such housing projects should in any event bear their just proportion of state and local taxation.

Further, however, section 626s-6 of Title 5, specifically referred to and incorporated in Title 12, section 1748d, provides: "The lessee's interest, made or created pursuant to the provisions of sections 626s-3 to 626s-5 of this title, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of said sections shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated." The first sentence of such section specifically makes lessee's interest subject to state and local taxation. However, the latter sentence has application only in the event that Congress should subsequently consent to taxation of the interest of the government in addition to the interest of the lessee. In that connection, as stated in *Meade Heights* v. *Tax Commission of Maryland*, 202 Md. 20, 92 A. 2d 280: "As we read this provision, it called for renegotiation only in the event that Congress should consent to taxation of the government's interest in addition to that of the lessee, which is recognized as fully taxable as of the date of execution." As hereinafter observed, section 8 of plaintiff's lease involved herein so recognized that construction.

Only plaintiff lessee's interest in the housing project, together with the fixtures thereof and its personal property used therein, is involved in this case. In other words, contrary to plaintiff's contention, this is not a case where the county has attempted to tax government property, but rather has taxed plaintiff's private property located on

an air force base wherein, as heretofore and hereinafter observed, the right to do so was specifically re-ceded by the Congress of the United States.

The facts are not in dispute. Plaintiff is a perpetual private Nebraska corporation, organized December 22, 1950, by one Carl C. Wilson and two other persons living in Omaha. Its authorized capital stock was $800,000, consisting of 80,000 shares, having a par value of $10 per share. Ten such shares were designated as "Preferred Stock." The rest was "Common Stock." Its principal place of business was designated as in Omaha. The general nature of its business was to provide housing for rent or sale, to acquire any real estate or interest or right therein, or appurtenances thereto, and any and all personal property in connection therewith; to improve, operate, and sell, convey, assign, mortgage, or lease any real estate and personal property; to borrow money and issue evidence of indebtedness in furtherance of any and all of the objects of its business, and to secure same by mortgage, deed of trust, pledge, or other lien; and "To apply for and obtain or cause to be obtained from the Federal Housing Commissioner a contract or contracts of mortgage insurance pursuant to the provisions of the National Housing Act as amended, covering bonds, notes and other evidences of indebtedness issued by this corporation and any indenture of mortgage or deed of trust securing the same. So long as any property of this corporation is encumbered by a mortgage or deed of trust insured by the Federal Housing Commissioner it shall engage in no business other than the construction and operation of a Rental Housing Project or projects."

Carl C. Wilson is president of plaintiff corporation. He is also president of another private corporation, called "Carl C. Wilson, Inc." The latter corporation was se-

lected as the building or construction contractor. It constructed the 611 modern housing units here involved for plaintiff corporation, and was compensated therefor by it. The Federal Housing Administration's amended Project Analysis, dated January 24, 1951, estimated that compensation required to be paid the building corporation for such construction would be $285,750. It estimated that plaintiff's net annual income from rentals, with 97 percent occupancy, after payment of maintenance, operating expenses, and taxes, would be $326,798. It estimated that the maximum insurable mortgage on plaintiff's interest in the project should be $4,949,100. In conformity with the Wherry Housing Act, the Secretary of Air Force certified that the average monthly rental charged and collected by plaintiff should be and was $71.04 per unit, which at 100 percent occupancy would gross $520,865.28 per year.

On January 18, 1951 the Secretary of the Air Force and plaintiff corporation entered into a lease whereby plaintiff was leased some 63 acres of described land on Offutt Air Force Base for a period of 75 years at $100 a year, "to be used for the purpose of erecting, maintaining and operating a housing project, consisting of approximately 611 units, substantially in accordance with the outline plans and specifications submitted to the Department of the Air Force and in accordance with the detailed plans and specifications to be approved by the Federal Housing Commissioner * * *." Forty-eight acres of such described land had been previously deeded to the United States by the Omaha Chamber of Commerce and the Air Force had appropriately taken exclusive jurisdiction thereof.

The lease required: "That an application for mortgage insurance under Title VIII of the National Housing Act,

as amended, for the said housing project, including Exhibits required therein, shall be submitted to the Federal Housing Administration within forty-five (45) days from the effective date of this lease. * * * That the lessee shall lease all units of the housing project to such military and civilian personnel of the Army, Navy, Marine Corps or Air Force (including Government Contractors' employees) assigned to duty at the military installation or in the area where such property is located, as are designated by the Commanding Officer, OFFUTT AIR FORCE BASE, OMAHA, NEBRASKA: provided, however, that" under certain circumstances and conditions, the lessee might lease such unit or units to persons other than such military or civilian personnel if their leases were limited to a term of 1 year with provision for an automatic renewal thereafter from month to month.

Section 8 of the lease specifically provides: "That the Lessee shall pay to the proper authority, when and as the same become due and payable, all taxes, assessments, and similar charges which, at any time during the term of this lease, may be taxed, assessed or imposed upon the Government or upon the Lessee with respect to or upon the leased premises. In the event any taxes, assessments, or similar charges are imposed with the consent of the Congress of the United States *upon the property owned by the Government and included in this lease (as opposed to the leasehold interest of the Lessee therein), this lease shall be renegotiated* so as to accomplish an equitable reduction in the rental provided above, which shall not be greater than the difference between the amount of such taxes, assessments, or similar charges and the amount of any taxes, assessments or similar charges which were imposed upon such Lessee with respect to his leasehold interest in the leased premises prior to the granting of

BUSINESS 1952

Schedule No.

A. BUSINESS AND PROFESSIONAL SCHEDULE
(READ INSTRUCTIONS ON REVERSE SIDE CAREFULLY)

CORPORATION ☐ PARTNERSHIP ☐ INDIVIDUAL ☐

TRADE NAME OF BUSINESS: Offutt Housing Company
OWNER'S NAME: Offutt Housing Company
BUSINESS ADDRESS: 918 City National Bank.
PRECINCT OR TOWN: Bellevue CITY OR VILLAGE: 2nd
IF IN VILLAGE WRITE YES:
PART OF SECTION: SE1/4 NE1/4 SEC. NO.: 35 2 TWP.: 13 13 RNG.: 14 13

B. For Assessor's Use Only
Recap. No.
Road Dist. No.
School Dist. No.
Fire Dist. No.
Tax Dist. No.

C. Type of Business—(See Classification at right)

D. 1951 return made in: State Co. Precinct School Dist.

E. List below Motor Vehicles owned, used in Business

YEAR	MAKE	BODY TYPE	FACTORY RATED CAP.	LICENSED YES	LICENSED NO	LICENSE NO.
19						
19						
19						
19						
19						

F. FURNITURE & FIXTURES—TOOLS & EQUIPMENT

COLUMN ONE	No.	Actual Value
General		
1. Adding Machines-Calculators	1	50
2. Air Conditioning Units		
3. Bookkeeping Mach. & Inter. Comm. Sys.		
4. Cameras and Kodaks		
5. Cash Registers	1	15
6. Chairs and Tables	10	30
7. Counters and Show Cases		
8. Desks	2	40
9. Desk and Floor Lamps		
10. Display Units and Shelving		
11. Files	2	20
12. Ice Cream Mach., Coolers		
13. Music Boxes		
14. Neon Signs and Clocks		
15. Penny Weighing Mach.		
16. Pinball Mach., Shuffleboards		
17. Radios	1	15
18. Safes, Storage Cabinets		
19. Scales		
20. Signs and Sign Panels		
21. Television Sets		
22. Tools, All Kinds		
23. Typewriters and Mimeographs	1	35
24. Vending Machines		
Professional		
1. Barber Chairs and Tools		
2. Book Cases-Magazine Stands		
3. Burial Equipment		
4. Comptometers		
5. Davenports and Settees		
6. Dental Chairs and Tools		
7. Dictaphones and Teletypes		
8. Hair Dryers		
9. Hospital Beds		
10. Operating Tables		
11. Permanent Wave Machines		
12. Professional Libraries		
13. Sun Lamps-Sterilizers		
14. Surgical Instruments		
15. X-Ray Equipment		
16. Other Prof. Equipment		
Retail Stores		
1. Cutters and Slicers		
2. Refrigeration Units		
3. Refrigerated Show Cases		
4. Refrig. Lockers & Equipment		
5. Shopping Buggies		
Lodging, Refreshment, Recreation		
1. Back Bars and Mirrors		
2. Beverage Coolers		
3. Booths and Tables		
4. Bowling Alleys and Equip.		
5. Carpets, Rugs and Draperies		
Carry This Total Forward		205

COLUMN TWO	No.	Actual Value
BALANCE CARRIED FWD		205
6. Dishes-Silverware-Utensils		
7. Mixers-Toasters-Coffee Mkrs.		
8. Mot. Pic. Proj., Cameras, Seats		
9. Pool & Billiard Tables & Equip.		
10. Popcorn & Vending Machines		
11. Soda Fountain Equipment		
12. Theatre Screens, Sound Panels		
Petroleum Sales—Motor And Implement Service		
1. Air Compressors		
2. Brake Lining Mach. & Equip.		
3. Gasoline Pumps		
4. Hoists and Grease Racks		
5. Jacks		
6. Lubesters and Dispensers		
7. Lubrication Equipment		
8. Motors, All Kinds		
9. Parts Bins		
10. Tanks No. Cap.		
11. Valve Grinders and Lathes		
12. Vulcanizing and Tire Equip.		
13. Welding Equipment		
14. Wheel Alignment Equip.		
Wholesale-Industrial Construction, Etc.		
1. Bottle Washers		
2. Bottling Machines		
3. Bulldozers-LeTourneaus		
4. Canning Machines		
5. Can Washers-Cream Testers		
6. Cement Mixers		
7. Churns-Pasteurizers-Homogenizers		
8. Conveyors-Elevators		
9. Dehydrating Machines		
10. Diesel Motors		
11. Draglines-Graders		
12. Drills and Dies		
13. Grain Dryers		
14. Grinders, Milling Equip.		
15. Incubators-Brooders		
16. Land Rollers-Scoops		
17. Lowboys		
18. Machine Saws-Lathes		
19. Packers-Airhammers		
20. Plating Equip. Sanders		
21. Tractors		
Miscellaneous and Specialized		
1. Household Appliances	69695	
2.		
3.		
4.		
5.		
6.		
7.		
8.		
9.		

TOTAL VALUE COLUMNS ONE AND TWO F

G. INVENTORY COMPUTATION FROM BOOKS (Do Not Reduce by Any Percentage)

1. Actual Value of Inventory as of End of Fiscal Yr.
2. Goods Pur. From End of Fiscal Yr. to Mar. 10.
3. Total of Lines 1 & 2
4. Total Sales From End of Fiscal Yr. to Mar. 10
5. Less Gross Profit (____%) Amount
6. Net Cost of Goods Sold (Difference between 4 & 5)
7. Value of Inventory Mar. 10 (Difference Between 3 & 6)
8. Value of Motor Vehicles, Dealers Only (Form 6 Attached)
9. Value of Total Inventory Mar. 10 (Total of Lines 7 & 8) TOTAL SECTION G. G

H. EXCESS CAPITAL INVESTED BY GRAIN DEALERS, OIL DEALERS, MOTION PICTURE DISTRIBUTORS AND SUGAR MANUFACTURERS (Special Schedule Form 5 Attached) H

I. IMPROVEMENTS ON LEASED LAND I 17557.85

Grand Total Value Sections F, G, H and I (Carry to Proper Line at Right. Do not reduce by Any Percentage) 8256.85

J. CLASSIFIED BUSINESS

	No.	Actual Value	
72. Advertising Agencies			72
73. Airports			73
74. Alfalfa Mills			74
75. Apartment Houses		825685	75
76. Attorneys			76
77. Bakeries			77
78. Barber & Beauty Shops			78
79. Book & Magazine Stores			79
80. Bowling Alleys			80
81. Broadcasting Stations			81
82. Cabin Camps & Motels			82
83. Cafes & Confectioneries			83
84. Carpenters & Contractors			84
85. Cleaners & Laundries			85
86. Clothing&DryGoodsStores			86
87. Coin Machine Operators			87
88. Cold Strge & Locker Plants			88
89. Creameries & Dairies			89
90. Dentists & Physicians			90
91. Department Stores			91
92. Drug Stores			92
93. Earth Movers			93
94. Florists & Greenhouses			94
95. Funeral Homes			95
96. Furniture Stores			96
97. Garages,Tire&Rep'rShops			97
98. Grain Dealers			98
99. Grocery & Meat Mkts.			99
100. Hardware&Appl'ceStores			100
101. Hatcheries			101
102. Hospitals			102
103. Hotels & Rooming House			103
104. Implement Dealers			104
105. Jewelry Stores			105
106. Liquor Stores			106
107. Lumber & Coal Dealers			107
108. Machine Shops			108
109. Manufacturers			109
110. Motion Picture Dist'rs.			110
111. Motor Vehicle Dealers			111
112. Nurseries			112
113. Offices, Real Est., Ins., etc.			113
114. Oil Dealers Retail			114
115. Oil Distributors			115
116. Optometrists			116
117. Packing & Process'g Plants			117
118. Photography Shops			118
119. Plmbg.&ElectricalContr's			119
120. Pool Halls & Taverns			120
121. Post Office Fixtures			121
122. Printing & Binding Plants			122
123. Produce Stations			123
124. Radio Shops			124
125. Shoe Repair Shops			125
126. Shoe Stores			126
127. Sugar Mfgrs.			127
128. Theatres			128
129. Variety Stores			129
130. Veterinarians			130
131. Well Drillers			131
132. Wholesalers & Dis'butors			132
133. Miscellaneous Business: (Specify)			133
134. 50% Penalty,F'lure to List			134
135. TOTAL TANGIBLE		825685	135★

K. INTANGIBLE PROPERTY CLASS "A"

1 Money on Hand, in Banks Checking and Savings Accounts		1
2 Postal Savings		2
3 Checks, Drafts or Bills of Exch.		3
TOTAL CLASS "A"		A

L. INTANGIBLE PROPERTY—CLASS "B"

4. Shares of stock in corporations, the capital stock of which is not assessed or taxed in this state. (List names on back hereof.)		4
5. Stock or shares of building and loan associations (Total amount ($_____) ten per cent of which is		5
6. Securities, debentures and bonds, (except those of the United States, this State, or any political subdivision thereof)		6
7. Notes, secured or unsecured, (except notes secured by mortgages on real estate situated in Nebraska)		7
8. Due bills, annuities, royalties and all sums of money receivable at stated periods		8
9. Book acc'ts or open acc'ts, judgments, other claims and demands for money or other valuable consideration or things not named		9
10. Value of capital stock, Nebraska & domesticated corporations (Special Schedule Form 4 attached)		10
.80 per $100.00 TOTAL CLASS "B"		B
TOTAL INTANGIBLE TAX		

M. OATH

STATE OF NEBRASKA } ss
COUNTY OF Sarpy

I, the undersigned, being duly sworn, say that the foregoing statement and schedule is true and contains a full and complete list of all property held by or belonging to me on March 10. Such property has been fully and fairly described and its true condition represented, and I have in no case sought to misrepresent the quantity or quality of the property. I further swear that my answers to the following interrogatories are true, so help me God.

Signed

By

Subscribed in my presence, and sworn to before me this 23 day of June 1952. Earnest Nielsen

Returned and corrected	By Co. Assessor	By Co. Board	By State Board
Tangible Totals			
Class A Totals			
Class B Totals			

THIS SCHEDULE WILL NOT BE ACCEPTED UNTIL OATH IS SIGNED AND ALL INTERROGATORIES ARE ANSWERED ON BACK HEREON.

Form 2—Authorized by State Tax Commissioner • This schedule MUST be made out by the property owner and SIGNED in ink or indelible pencil after schedule is filled out. Return to JOE C. STOLINSKI, County Assessor Douglas County, Omaha, Nebr. When completed and sworn to it must be made out by the property owner and SIGNED in ink or indelible pencil after schedule is filled out. Return to JOE C. STOLINSKI, County Assessor Douglas County, Omaha, Nebr.

OMAHA PRINTING COMPANY

Exhibit 5—Assessment Schedule 1952. A. 3

SHARES OF STOCK IN CORPORATIONS—Capital Stock of Which is Not Assessed or Taxed in This State			
NAME OF CORPORATION	Number of Shares	Value Per Share	Total Value (List Dollars Only)

Have you made a Business and Professional Schedule other than this one in 1952?

Answer ___ If answer is yes, state where

INTERROGATORIES

77-1231 of the revenue law provides that the person required to list intangible and tangible property shall answer in writing, over his signature and under oath, the following interrogatories:

Interrogatory 1: Are you, or were you, on March 10 of the present year, the excutor of the last will, or the administrator of the estate of any deceased person, or the guardian of the estate of any infant or person of unsound mind, or the trustee of the property of any person, or the receiver of any corporation, association or firm, or the agent, attorney or banker investing, loaning or otherwise controlling the money or the property of any person or the president or accounting officer of any corporation, or a partner, consignee, or pawnbroker? If yes, designate for whom you were then, or now are, acting in such representative or fiduciary capacity; and if you were then, or now are, acting under the authority of any particular court, name the court, and also state to what court you report.

Answer.....

Interrogatory 2: Have you, since March 10 of last year, either personally or through the agency of others, caused all or any part of your taxable property or other property to be temporarily converted, either by sale, loan, exchange or in any other manner, into bonds or other securities of the United States not taxable, or any other property not taxable, with the intention to pay back, return, exchange or dispose of such property after you have made out your tax statement? Or did you on or before March 10 of the present year, and before you saw this interrogatory, pay back, return, exchange or dispose of any such property for the purpose aforesaid?

Answer.....

Interrogatory 3: If you have converted any of your money or property, or money or property of any other person, as inquired of you, then state when the same was so converted or invested, and the time and amount of value therof.

Answer.....

Interrogatory 4: Have you, at any time since March 10 in the preceding year, withdrawn from any bank any money deposited therein for the purpose of converting the same into some form of nontaxable property, or for the purpose of sending the same out of the state, or transferring the same to some other person or persons, with the intent or purpose of evading the payment of tax on the same?

Answer.....

or any such property for the purpose aforesaid?

Answer.....

Interrogatory 3: If you have converted any of your money or property, or money or property of any other person, as inquired of you, then state when the same was so converted or invested, and the time and amount of value therof.

Answer.....

Interrogatory 4: Have you, at any time since March 10 in the preceding year, withdrawn from any bank any money deposited therein for the purpose of converting the same into some form of nontaxable property, or for the purpose of sending the same out of the state, or transferring the same to some other person or persons, with the intent or purpose of evading the payment of tax on the same?

Answer.....

GENERAL INSTRUCTIONS

1. According to the provisions of Section 77-1229, R.R.S. Nebr. 1943, you are required to make out a true statement, list or schedule of all intangible and tangible personal property subject to taxation which is held by you as owner, lessee or occupant in control thereof, or as guardian, husband, parent, trustee, executor, administrator, receiver, accounting officer, partner, agent or other representative officer. You are further required to verify said statement, list or schedule under oath before the county assessor, his assistants, a notary public or some other person authorized by law to take acknowledgments and return same to the county assessor or his assistants on or before April 20th. The law states the word "None" must be written opposite each item where no property of that kind is owned. Return intangible and tangible personal property of wife and children on this schedule unless separate schedules are filed.

2. While property is listed for taxation as of March 10, nevertheless Section 77-1211, R.R.S. Nebr. 1943, provides for the listing of property brought into the State or county after the tenth day of March and prior to the first day of July.

3. Section 77-412, R.R.S. Nebr. 1943, empowers the county assessor to add to the return of any taxpayer items of property he may find have been omitted and to change the valuation of any item of property in the return to what he deems to be its actual value. Notice of such change shall be given to the taxpayer or his agent by postcard to the address of the taxpayer shown on the return.

4. Section 77-413, R.R.S. Nebr. 1943, provides that any personal property either tangible or intangible which was not returned for taxation for any or all of the three previous years shall be taxed at the rate of levies for the year in which such property was omitted, and there shall be added interest at the rate of 7 percent plus a penalty of 10 percent of the tax on tangible property and 50 percent of the tax on intangible property.

5. The County Board of Equalization, which is composed of the County Board, the County Assessor, and the County Clerk, meets on the first Monday in May and continues in session not more than fifty days, or less than three days.

6. If you are doing business as a corporation organized under the laws of Nebraska, this schedule must be accompanied by the Nebraska Corporation Schedule, Form 4, properly filled out.

SPECIAL INSTRUCTIONS FOR COMPUTING THE BUSINESS AND PROFESSIONAL SCHEDULE

The Business and Professional Schedule is made up of 13 parts lettered "A" to "M" inclusive. Contents of each section should be carefully considered and accurately completed.

A. Enter the full name of the owner together with the trade name of the business and the information requested as to its location. Indicate whether the business is organized as a corporation, partnership or individual proprietorship. If a corporation or partnership, owner's name and trade name may be identical. In such case, list in both spaces provided. All corporations will complete the supplemental Corporation Schedule, Form 4, and attach the same to this report.

B. The assessor or his assistant will complete this section.

C. State correctly type of business you are in, such as "Grocery Store," "Department Store," etc. Your business should conform to one or more of the classifications listed in Section J. If none of the businesses enumerated in Section J properly

by the Nebraska Corporation Schedule, Form 4, properly filled out.

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B. The assessor or his assistant will complete this section.

C. State correctly type of business you are in, such as "Grocery Store," "Department Store," etc. Your business should conform to one or more of the classifications listed in Section J. If none of the businesses enumerated in Section J properly describe your enterprise, you may substitute your own description in the space provided.

D. Answer the questions in Section D correctly, especially if you have moved since making your last return, as it will facilitate assessing your motor vehicles in the correct taxing district.

E. List all motor vehicles used in the business, whether licensed or not; include trailers.

F. List items of furniture and equipment in this section. All business establishments will have some items in the first or general group. After completing the listings in this group, choose from the remaining groups the one that most nearly fits the particular type of business and list the remaining items of Furniture and Equipment. Items not listed on the schedule, should be written on the blank lines under the heading "Miscellaneous and Specialized."

G. This section contains the formula for computing the value of merchandise on hand March 10, and Section G must be filled out completely and the final value entered on line 9 thereof.

H. Grain dealers, oil distributors, motion picture distributors and sugar manufacturers will complete the Special Schedule, Form 5, in accordance with instructions thereon, and carry the value of excess capital invested to line H.

I. Here you will enter the value of all improvements owned by the business which are not assessed and taxed as real estate.

J. The grand total of Sections F, G, H and I, will be carried to the right and entered opposite the classification corresponding to that shown in Section C. If you are the custodian of any property not owned by your business, or if you have merchandise on consignment owned by others, you must make another schedule for that property and sign the same as agent for the respective concern.

K. You are held responsible for filling this part of the schedule truthfully. This type of property is subject only to an intangible tax of 25c on every one hundred dollars' valuation.

L. Furnish this information as requested.

M. Look your schedule over carefully before signing. Bear in mind that you are swearing under oath to its accuracy and that penalties in addition to those outlined in paragraph 4 of the General Instructions can be levied if a fraudulent return is made. See Sections 77-1232, R.R.S. Nebr. 1943 and 77-1233, R.R.S. Nebr. 1943.

SPECIAL NOTICE: Special supplementary schedules must be completed by the following types of business and the same attached to this schedule before returning to the County Assessor:

1. Corporations organized under the laws of the State of Nebraska; 2. Motor vehicle dealers; 3. Grain dealers, oil distributors, motion picture distributors and sugar manufacturers.

If you are one of the above and do not have a special schedule along with this schedule, request one from your County Assessor at once.

such consent by the Congress of the United States * * *." (Italics supplied.)

Plaintiff was required to comply with all applicable laws; to keep the buildings and improvements in good order, condition, and repair, and save the government harmless from failure in that respect; to keep them insured against fire in an amount determinable by the government but at its own expense, with loss payable to lessee and any security holder jointly as their interest may appear; and in the event of any partial loss or damage to the improvements, lessee was required within a reasonable time to restore them to their former condition. Plaintiff also had the right to permit utility companies to extend water, sewer, gas, telephone, and electric power lines on the premises for the exclusive purpose of furnishing utilities to the housing project.

Thereafter, on February 1, 1951, plaintiff, as mortgagor, mortgaged its "described leasehold situated in the ..... of ....., County of Sarpy, and State of Nebraska, to-wit: all right, title, interest and privileges of the mortgagor in and to that certain ground Lease between the SECRETARY OF THE AIR FORCE representing the UNITED STATES OF AMERICA, and Mortgagor, dated January 18, 1951 * * * Together with the privileges and appurtenances to the same belonging, and all of the rents, issues, and profits which may arise or be had therefrom; and * * * all buildings and improvements of every kind and description now or hereafter erected, or placed thereon," including all fixtures of every described kind "together with all building materials and equipment now or hereafter delivered to said premises and intended to be installed therein" and "All articles of personal property owned by the Mortgagor and now or hereafter attached to or used in and about the building or buildings now erected or here-

after to be erected on the lands herein described" all of which property was deemed fixtures to the extent permitted by law. The mortgagee was Manufacturers Trust Company of New York. The principal of the mortgage was $4,949,100, with interest at 4 percent per annum, upon the unpaid balance until paid by monthly installments of $22,683.37, all according to the terms of a promissory note of even date. In addition thereto, plaintiff agreed to pay monthly to the mortgagee a sum sufficient to prevent delinquency of premium charges under the contract of mortgage insurance with the Federal Housing Commissioner, together with ground rentals, tax assessments, water rents, fire and other hazard insurance premiums. Plaintiff also agreed to pay all taxes levied on the mortgagee's interest in the improvements and upon the mortgage or debt secured thereby, excluding any income tax, state or federal, imposed on the mortgagee.

Plaintiff was required to keep the improvements and equipment then existing or therafter erected, insured against loss by fire or other hazard, in an amount equal to not less than 80 percent of the actual cash value thereof, with loss payable to mortgagee and the Federal Housing Commissioner as their interests may appear. The mortgage also provided that any amount paid for loss should, to the extent of indebtedness unpaid, be paid to the mortgagee and at its option such may be applied on the debt or released for repairing or rebuilding the premises.

Plaintiff further agreed to commit or suffer no waste of the property and keep same in good condition and repair, and in all respects conform to and comply with the covenants, provisions, terms, condition, and agreements of the valid ground lease executed January 18, 1951, then in full force and effect. Many other provisions, terms, and conditions upon which the right of forfeiture or default

might depend appear in the mortgage, but they are of no importance here. The mortgage was duly insured by the Federal Housing Administration, and the 611 modern housing units, equipped as covered by the mortgage, were constructed, with 78 percent of them completed by March 10, 1952, and all of them by about June 6, 1952. Concededly, the buildings and improvements have a useful life expectancy of only about 35 years.

On April 11, 1952, the Attorney General of this state rendered an opinion that plaintiff's interest in the project, including all of the personal property used therein, was taxable as personal property. Report of Attorney General, 1951-1952, p. 486. Nevertheless, plaintiff filed no tax return, and on June 23, 1952, the county assessor of Sarpy County prepared and filed a "Business 1952 Schedule," for plaintiff corporation in which he listed "Furniture & Fixtures—Tools & Equipment $205 * * * Household Appliances $69,695 * * * Improvements on Leased Land $755,785." The total was listed as "Apartment Houses $825,685." The property is not located in any municipality or school district, thus there was a state and county tax levy and assessment of $10,783.45, no part of which tax was ever paid by plaintiff after due notice thereof.

In that connection, section 4 of the Enabling Act provides in part: "* * * that no taxes shall be imposed by said state on lands or property therein belonging to or which may hereafter be purchased by the United States." Volume 2, R. R. S. 1943, p. 7. Section 72-601, R. R. S. 1943, provides in part: "The consent of the State of Nebraska is granted to the United States of America * * * for the purchase by the United States of such other lands within the State of Nebraska as the agents or authorities of the United States may from time to time select for the erection of forts, magazines, arsenals and other needful buildings." Section 72-602, R. R. S. 1943, provides: "The

jurisdiction of the State of Nebraska in and over the lands mentioned in section 72-601 shall be ceded to the United States; Provided, the jurisdiction ceded shall continue no longer than the United States shall own or occupy such lands." Section 72-604, R. R. S. 1943, provides: "The jurisdiction ceded shall not vest until the United States shall have acquired the title to such lands by purchase or grant. So long as the lands shall remain the property of the United States, when acquired as provided in section 72-601, and no longer, they shall be exempt from all taxes, assessments, and other charges which may be levied or imposed under the authority of the laws of this state."

Article I, section 8, Constitution of the United States, gives Congress exclusive legislative authority over all such places purchased by consent of the Legislature of the state, and gives it authority "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Thus, if Congress by its legislative acts heretofore set forth consented to the occupation of its lands by lessee and the taxation of lessee's interest in the project erected thereon, then, in that respect, any immunity or exemption thereof from taxation appearing in the Enabling Act and ceding statutes of this state was waived. In other words, the right to tax lessee's interest in the housing project located on the air base was re-ceded to the State of Nebraska. *Board of County Commissioners* v. *United States*, 105 F. Supp. 995. Such case is also comparable in principle with that at bar and supports the right to tax plaintiff's interest here involved.

Article VIII, section 1, Constitution of Nebraska, provides in part: "The necessary revenue of the state and

its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct; but taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, and taxes uniform as to class may be levied by valuation upon all other property." Section 2 provides in part: "The property of the state and its governmental subdivisions shall be exempt from taxation. * * * No property shall be exempt from taxation except as provided in this section." In that connection, plaintiff's interest here involved is not constitutionally exempt from taxation.

Further, our revenue and taxation statutes are controlling. Section 77-102, R. R. S. 1943, provides: "The word 'property' includes every kind of property, tangible or intangible, subject to ownership." Section 77-104, R. R. S. 1943, provides: "The term 'personal property' includes all property other than real property and franchises." Section 77-201, R. R. S. 1943, provides: "All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value." (Such statute was amended, effective March 6, 1953, to provide that all such property should be valued at its actual value, but shall be assessed at fifty percent of its actual value.) Section 77-1201, R. R. S. 1943, provides in part: "A complete list of all personal property held or owned on March 10 of the year in which the assessment is being made, except motor vehicles, shall be made as follows: (1) Every person of full age and sound mind, being a resident of this state, shall list * * * all other personal property * * *." Section 77-1229, R. R. S. 1943, provides: "Every person required to list property shall make out and verify by his oath a statement of all personal property which he is required to list, either as owner, lessee or occupant in control thereof * * * upon the blanks pre-

scribed by the State Tax Commissioner. Such blanks shall be delivered to each taxpayer by the county assessor or his assistants for that purpose, and when so made out shall be verified by each person before the county assessor, his assistants, a notary public, or some other person authorized by law to take acknowledgments, and be delivered to the county assessor or county clerk as ex efficio county assessor on or before April 20 of each year."

This court in *Ashby* v. *Peters*, 124 Neb. 131, 245 N. W. 408, next reported 128 Neb. 338, 258 N. W. 639, 99 A. L. R. 843, held that: "Save for the purposes of conveyancing, a lease of more than one year is not real estate." See, also *Paul v. Cameron*, 127 Neb. 510, 256 N. W. 11. Generally, a leasehold for a term of years is a chattel real, falling within the classification of personal property. 51 C. J. S., Landlord and Tenant, s. 26, p. 531. For all practical purposes, it may be the equivalent of absolute ownership. 51 C. J. S., Landlord and Tenant, s. 202, p. 809. In that connection, section 77-1209, R. R. S. 1943, specifically applicable here, provides: "All improvements put on leased public lands shall be assessed to the owner of such improvements as personal property, together with the value of the lease, and listed and assessed as such in the place where the land is situated. The taxes imposed on such improvements shall be collected by levy and sale of the interest of such owner, the same as in all other cases of collection of taxes on personal property, or by suit in the name of the county against such owner."

For taxation purposes, what is meant by public lands, as used in section 77-1209, R. R. S. 1943? In *Union Pacific Ry. Co.* v. *Karges*, 169 F. 459, quoting from *Northern Lumber Co.* v. *O'Brien*, 139 F. 614, 71 C. C. A. 598, it is said: "'The words "public land" have long had a settled meaning in the legislation of Congress, and, when a different in-

tention is not clearly expressed, are used to designate such land as is subject to sale or other disposal under general laws, but not such as is reserved by competent authority for any purpose or in any manner, although no exception of it is made. (Numerous cases cited.)' '' However, thereafter the court said: ''These decisions do not conflict with the settled doctrine that, where it clearly appears from the statute that the term 'public lands' is intended to include lands which have theretofore been reserved by Congress for a specific purpose, such intention will prevail, as it is a fundamental rule of construction that a legislative act is to be interpreted according to the plain intention of the legislative body.'' See, also, *Dugan* v. *Montoya,* 24 N. M. 102, 173 P. 118; *United States* v. *Bisel,* 8 Mont. 20, 19 P. 251; *United States* v. *Blendaur,* 128 F. 910.

Cotulla v. *Laxson,* 60 Tex. 443, involved a penal statute which made it an offense for any person who was an officer or clerk in the general land office, or a county surveyor or his deputy, to directly or indirectly be concerned in the purchase of any right, title, or interest in any public lands. In that opinion it is said: ''That the term 'public land,' as used in that article, is not limited in its signification to unappropriated public domain, but also includes what is usually designated as public school lands, it seems to us admits of no question. These public school lands were set apart for a public purpose, devoted to the promotion of public education. The act of appropriation, or, rather, the dedication of these lands to that purpose, did not work a change in their ownership; true they were not thereafter unappropriated public domain, but as ever belonged to the public.''

In *Deshazo* v. *Eubank,* (Tex. Com. App.), 222 S. W. 976, involving a comparable situation, it is said, referring to public lands: ''The sense in which the term is used may vary

somewhat in the different statutes, and it should be given such meaning as will effectuate the intention of the Legislature in its use." The opinion thereafter cited and quoted with approval from *Cotulla* v. *Laxson, supra.*

As stated in 73 C. J. S., Public Lands, s. 1, p. 647; "The meaning of the words 'public lands,' may vary somewhat, however, in different statutes passed for different purposes, and they should be given such meaning in each as comports with the intention of the legislature in their use." See, also, *State ex rel. Sioux County* v. *Tucker,* 38 Neb. 56, 56 N. W. 718.

We believe our Legislature intended that the term "leased public lands" as used in section 77-1209, R. R. S. 1943, for taxation purposes, should and does mean "lands belonging to the public, which have been leased as authorized by law."

Plaintiff's lease provided that upon its expiration or earlier termination, all improvements made upon the leased premises should, with exceptions unimportant here, remain the property of the government without compensation. It also provided that the buildings and improvements erected by the lessee constituting the housing project should be and become as completed real estate and part of the leased land and public buildings of the United States, leased to lessee for the purpose of serving the governmental and public purpose of military housing in accordance with Title VIII of the National Housing Act, and in accordance with the provisions of the lease and subject to the term of the lease and any renewal or extension of the same. As we view it, the first sentence aforesaid simply provided when and in what manner plaintiff's interest would ultimately become the government's property, while the second sentence simply prevented plaintiff from destroying the mortgage security insured by the government and from

defeating the purpose of the housing project by removing any of the buildings or improvements from the leased land and assured plaintiff's performance of the terms and conditions of the mortgage and lease. The language used therein did serve to retain the bare legal title in the government for a nominal consideration of $100 per year, but it did not in any manner deprive plaintiff of the ownership of its interest as lessee, which for all intents and purposes was the actual value of all the buildings and improvements, together with the fixtures thereof and all personal property used therein on the leased land so long as its lease was in force and effect. In *Ken Realty Co.* v. *Johnson,* 138 F. 2d 809, it is pointed out that: "But when a separate interest in a piece of property is exempt, or its owner is immune from taxation, the several separate interests must be recognized" for tax purposes.

In that regard, plaintiff's lease was for a period of 75 years, which was 5 years longer than 3 score and 10, the convential life of ordinary man. It was for a period so long that plaintiff would have dominion or control and could profitably use and consume the entire useful life of two complete generations of housing units, each having a useful expectancy of 35 years, with 5 years still remaining for unexpected longevity. Also, in conformity with federal laws, plaintiff mortgaged its interest as owner thereof for $4,949,100, the estimated replacement cost of which was $5,449,490, and the Federal Housing Commissioner duly insured the mortgage. In addition, plaintiff corporation entered into and filed conditional sales contracts and chattel mortgages covering furniture, appliances, and equipment used in the housing project, the consideration for which totalled $110,933.97. Further, on July 28, 1953, Carl C. Wilson, both as president of plaintiff corporation and as president of Carl C. Wilson, Inc., duly signed and acknowledged the execution of a limited assignment of Offutt hous-

ing project rentals to the Douglas County Bank of Omaha for the business purposes and advantage of both corporations. Therein it was represented in part that Offutt Housing Corporation was the owner of 611 housing units located at Offutt Field, Sarpy County, Nebraska. As a witness in this case, Carl C. Wilson also conceded that the improvements had only a life expectancy of about 35 years, "that any building that was seventy-five years old was not worth maintaining any farther than that," and that plaintiff was entitled to the possession and use together with all income and profits therefrom, for 75 years at a rental of only $100 a year.

We therefore conclude that for purposes of taxation under the provisions of section 77-1209, R. R. S. 1943, plaintiff was in fact and as a matter of law the owner of all the improvements, including the fixtures, appliances, equipment, furniture, and other personal property used therein, so long as his lease was in force and effect, all of which was taxable as personal property. To conclude otherwise would permit plaintiff to perpetrate a sham and fraud upon the state and its governmental subdivisions.

The following authorities support the foregoing conclusions. *Baltimore Shipbuilding & Dry Dock Co.* v. *Mayor of Baltimore,* 97 Md. 97, 54 A. 623, affirmed in 195 U. S. 375, 25 S. Ct. 50, 49 L. Ed. 242, quoted with approval from *North Pacific R. R. Co.* v. *Patterson,* 154 U. S. 130, 14 S. Ct. 977, 38 L. Ed. 934, and *Wisconsin R. R. Co.* v. *Price County,* 133 U. S. 496, 10 S. Ct. 341, 33 L. Ed. 687, wherein it is said: " 'that he who has the right to property, and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of State taxation.' "

The opinion in *Meade Heights* v. *Tax Commission of Maryland, supra,* disposed of five cases involving the same

taxation principles, wherein three private corporations had leased from the United States five separate parcels of land located upon military reservations over which the federal government had exclusive jurisdiction. They severally constructed housing units thereon under authority of the federal housing statutes heretofore cited and discussed. The corporations had appealed from a tax assessment upon their interest in the buildings at full value thereof, and the court affirmed. The situation in such cases was in all material respects identical with that at bar except the particular applicable state statutes and two provisions of the lease, which could not change the ultimate result herein. In that regard, the lease of Meade Heights, Inc., was of 28½ acres at Fort Meade for 75 years, at a ground rental of $720 per annum, with a provision that title to all improvements erected should remain in lessee with a right of removal at termination, if it so elected. If it did not so elect, they would become property of the government, without compensation to lessee. In that opinion, it is said: "Coming to the main point, it is perfectly clear that, in the absence of congressional consent, express or implied, a State cannot impose a direct tax upon property owned by the federal government or held for it. (Citing cases.) But it is equally clear that private interests in government property are taxable to their full value. (Citing cases.) In the instant case, Congress has definitely consented to the taxation of the lessee's interest, whatever that may be. It can only complain if, in fact, its reserved interest is subject to taxation. * * * The assessment before us is against the lessee, and purports to reach the full value of the buildings in its hands. The government cannot complain if the tax, otherwise sustainable, increases government costs by its economic incidence. *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 58 S. Ct. 208, 82 L. Ed. 155; *Alabama* v. *King & Boozer*, 314 U. S. 1, 62 S. Ct. 43, 86 L. Ed. 3."

Gay v. *Jemison* (Fla.) 52, So. 2d 137, also involved the same taxation principles, but from a somewhat different statutory angle. In such case, the comptroller appealed from a decree in favor of plaintiff enjoining the collection of taxes on materials to be used in construction of 450 housing units on similar land leased by a private corporation from the United States. As hereinafter observed, the lease was in all material respects identical with that here involved. The court in that opinion dismissed plaintiff's bill of complaint, saying: "Comparing the probable useful life of the buildings with the time for which the lease is to extend, the question immediately arises in one's mind whether the useful life of the buildings will not have ended by the time the lease expires. We have already said also that the buildings are for the 'primary' use of military personnel. It may be assumed that this is the chief purpose of the installation; however, the lease contains the statement that the property may be occupied by civilian as well as military personnel of the army, marine corps, and air force; and, further, that upon failure of the commanding officer of the field to designate persons of those classifications to tenant any units within a certain length of time after they become vacant, the lessee may then rent to parties who do not fall in any of these categories.

"It is an obligation of the lessee to comply with all ordinances with reference to licenses and permits to do business and it is its privilege to engage public utility companies to provide water, fuel, telephone service, and electric power for the use of the occupants of the units. The lessee is bound to maintain the property in a state of good repair and to save the government harmless against all actions and suits springing from any failure in this respect.

"The lessee is required at its own cost to insure the buildings and to restore any of them damaged by fire, but

if a building is wholly destroyed, then the lessee has the right to determine that the building shall not be reproduced.

"The lessee must pay 'all taxes, assessments, and similar charges which, at any time during the term of (the) lease, may be taxed, assessed or imposed upon the Government or upon the Lessee with respect to or upon the leased premises.'

"The bare title of the property, of course, remains in the United States Government, and for its use the government receives but $100 a year.

"Bearing in mind what we consider the evident intent of the Congress of the United States, and construing the language of the contract between the Government of the United States and the lessee, we cannot arrive at the chancellor's conclusion that this housing project when completed will be a public work owned by the United States Government.

"It is true that the government, through its military, retains a certain supervision over the area where the project is located and has a preference with reference to accommodations for its personnel, but taken as a whole, the arrangement is in reality one affording a source of income to the lessee, and we think it is obvious that any money withheld from the state by applying the exemption would not benefit the national exchequer but would reach the pockets of private citizens. The corporation borrows the money, takes the risks, bears the cost of maintenance and insurance, receives the income from rentals, and in case of total destruction of a building by fire, keeps, if it chooses, the money paid by the insurance company to cover the loss. The corporation must pay the debt it incurs to finance the installation, and certainly any profit for a period of seventy-five years belongs to it. Meanwhile as

a part of its expenses there is the nominal payment of $100 a year to the government as lessor.

"We believe the Comptroller's position is correct and that the materials furnished by the contractor will not become a part of a government work but of buildings of a private enterprise, and therefore are subject to state tax."

Tampa Bay Garden Apartments v. *Gay* (Fla.). 55 So. 2d 739, also involved the same taxation principles from a somewhat different statutory angle. In such case the private corporation appealed from a decree dismissing its bill of complaint and requiring it to secure a certificate of registration and collect a 3 percent sales tax from occupants of the housing units. In the opinion, after citing *Gay* v. *Jemison, supra,* with approval, the court affirmed the judgment, saying: "We find nothing in these cases or in the language of the pertinent legislative acts that show any purpose whatever to release the jurisdiction of the State over the lands in question so as to prohibit it from imposing the required three per cent sales tax on the housing project."

Davis v. *Howard,* 306 Ky. 149, 206 S. W. 2d 467, also involved the same taxation principles from a somewhat different statutory angle. In the opinion it was said: "Undoubtedly, it was the purpose of the Congress to recede to the state sufficient sovereignty over Federal areas within its territorial limits to enable it to levy and collect taxes named in the Act. Otherwise the Act was a futile gesture." See, also, *Kiker* v. *Philadelphia,* 346 Pa. 624, 31 A. 2d 289, certiorari denied 320 U. S. 741, 64 S. Ct. 41, 88 L. Ed. 439; *Bowers* v. *Oklahoma Tax Commission,* 51 F. Supp. 652.

For reasons heretofore stated, we conclude that plaintiff's interest in the housing units and fixtures as owner

D.

OPINION OF THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY, VIRGINIA, IN THOMASON PARK, INCORPORATED v. COUNTY OF PRINCE WILLIAM, VIRGINIA.

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY, VIRGINIA.

THOMASON PARK, INCORPORATED,
vs.
COUNTY OF PRINCE WILLIAM, VIRGINIA.

The plaintiff, a domestic corporation, hereinafter referred to as the "applicant," has petitioned this court for the recovery of certain taxes paid by it under protest to the County of Prince William Virginia, alleging that it was erroneously assessed with real estate taxes for the years 1952 and 1953 by the Commissioner of the Revenue of said county.

From the stipulated facts and the evidence heard *ore tenus* it appears that in the year 1950 the applicant leased three certain parcels of land situate near Triangle, Prince William County, Virginia, from the United States of America, under an agreement of lease which was entered into by virtue of the authority conferred upon the Secretary of the Navy by Act of Congress of August 5, 1947, and amendments thereto (61 Stat. 774; 34 U. S. C. A. 522a-522e). These parcels of land were leased by the applicant (formerly Marineland Park, Incorporated) for the purpose of the construction, operation and maintenance by it of a housing project on the leased premises. The land upon

which the improvements have been constructed and erected constitutes a part of the United States Marine Corps Reservation, known as Marine Corps Schools, Quantico, Virginia, over which the Federal Government exercises exclusive jurisdiction.

The applicant has been assessed with real estate taxes on such improvements in the amount of $2,500.00 and $11,925.00 for the tax years 1952 and 1953, respectively. It contends that it owns no interest in real estate in Prince William County taxable as such by the county; that the county cannot tax property of the United States by means of an assessment against a lessee of the United States and that property located upon lands over which the United States has exclusive jurisdiction is exempt from taxation by the county.

The Commissioner of the Revenue, who was examined as a witness, testified that in assessing the improvements on the land to the applicant he placed thereon the same valuation that he would have if the land were owned in fee simple by the applicant. He also testified that he made no assessment against the land itself as he did not consider it as being owned by the applicant and that he made no assessment against the applicant with respect to its leasehold interest in the land.

The lease itself, for which the applicant pays to the United States the sum of $1.00 for the entire term thereof, contains twenty-six numbered paragraphs but it would seem necessary to refer to but few of the many terms and conditions. The duration is for a period of seventy-five years but with the right reserved to the United States to terminate the same at the expiration of thirty-nine years under stated conditions. Also, unless certain conditions otherwise prevail, all housing units shall be rented to such personnel, military and civilian, of the Army,

D.

OPINION OF THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY, VIRGINIA, IN THOMASON PARK, INCORPORATED v. COUNTY OF PRINCE WILLIAM, VIRGINIA.

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY, VIRGINIA.

THOMASON PARK, INCORPORATED,
vs.
COUNTY OF PRINCE WILLIAM, VIRGINIA.

The plaintiff, a domestic corporation, hereinafter referred to as the "applicant," has petitioned this court for the recovery of certain taxes paid by it under protest to the County of Prince William Virginia, alleging that it was erroneously assessed with real estate taxes for the years 1952 and 1953 by the Commissioner of the Revenue of said county.

From the stipulated facts and the evidence heard *ore tenus* it appears that in the year 1950 the applicant leased three certain parcels of land situate near Triangle, Prince William County, Virginia, from the United States of America, under an agreement of lease which was entered into by virtue of the authority conferred upon the Secretary of the Navy by Act of Congress of August 5, 1947, and amendments thereto (61 Stat. 774; 34 U. S. C. A. 522a-522e). These parcels of land were leased by the applicant (formerly Marineland Park, Incorporated) for the purpose of the construction, operation and maintenance by it of a housing project on the leased premises. The land upon

which the improvements have been constructed and erected constitutes a part of the United States Marine Corps Reservation, known as Marine Corps Schools, Quantico, Virginia, over which the Federal Government exercises exclusive jurisdiction:

The applicant has been assessed with real estate taxes on such improvements in the amount of $2,500.00 and $11,925.00 for the tax years 1952 and 1953, respectively. It contends that it owns no interest in real estate in Prince William County taxable as such by the county; that the county cannot tax property of the United States by means of an assessment against a lessee of the United States and that property located upon lands over which the United States has exclusive jurisdiction is exempt from taxation by the county.

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Navy, Marine Corps and Air Force as may be designated by the Commandant, Marine Corps Schools, Quantico, Virginia. The eighth paragraph of the lease provides in pertinent part the following:

> "8. That the lessee shall pay to the proper authority, when and as the same shall become due and payable, all taxes, assessments, and similar charges which, at any time during the term of this lease, may be taxed, assessed or imposed upon the government or upon the lessee with respect to or upon the leased property. In the event any taxes, assessments or similar charges are imposed with the consent of the Congress of the United States upon the property owned by the Government and included in this lease (as opposed to the leasehold interest of the lessee therein) this lease shall be renegotiated so as to accomplish an equitable reduction in the rental provided above, which shall not be greater than the difference between the amount of such taxes, assessments or similar charges and the amount of any taxes, assessments or similar charges which were imposed upon such lessee with respect to his leasehold interest in the leased property prior to the granting of such consent by the Congress of the United States; * * *".

The paragraph in the lease above referred to was obviously inserted pursuant to the mandate of the Act of Congress of August 5, 1947 (61 Stat. 775; 34 U.S.C.A. 522e) for the following is provided for:

> "522e. The lessee's interest, made or created pursuant to the provisions of sections 522a-522c and 522e of this title, shall be made subject to state or local taxation. Any lease of property authorized under the provisions of said sections shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated."

The following provision is found as Paragraph eleven of the lease:

> "11. That upon the expiration of this lease, or earlier termination, all improvements made upon the leased premises and all ranges, refrigerators, screens, shades and other items required to be furnished with the improvements in accordance with the plans and specifications submitted by the lessee, and approved by the Federal Housing Commissioner, shall remain on the leased premises and be the property of the Government without compensation; Provided, however, that where the lessee replaces any such items, this Condition 11 shall apply only to the replacement."

The decision of the Commissioner of the Revenue of Prince William County to exempt from assessment the land upon which the improvements have been constructed was eminently correct for the land was acquired by the United States with the consent of the Commonwealth of Virginia in the year 1918 as authorized by the seventeenth section of the eighth clause of the first article of the Constitution of the United States; the consent of the Commonwealth being found in the form of an act of cession as Chapter 382 of the Acts of Assembly of 1918, approved March 16, 1918. The third paragraph of the act provides that:

> "3. The jurisdiction ceded shall not vest until the United States shall have acquired the title to, or possession of the said lands, or rights, or interest therein by purchase, condemnation, lease, or otherwise; and so long as the said lands, or any rights, or interest therein are held in fee simple by the United States, and no longer, such rights, or interest, as the case may be, shall continue exempt and exonerated, from all State, county and municipal taxation, assessment or other charges, which may be levied or imposed under the authority of this State."

By this act of cession the Commonwealth of Virginia relinquished every vestige of authority over the land save for the reservation of the right of service of all civil and criminal process of the courts of this state. Following the acquisition of this land by the United States in the manner stated sole and exclusive jurisdiction, political dominion and sovereignty became vested in the latter and continues to be vested in it. The following cases constitute but few of a vast number of reported decisions touching the matter of jurisdiction of the United States over lands and other property owned by it: *Fort Leavenworth Railroad Company* v. *Lowe*, 114 U. S. 525; *United States* v. *Cornell*, 2 Mason 60; *Commonwealth* v. *Clary*, 8 Mass. 72; *Mitchell* v. *Tibbitts*, 17 Pickering 298; *Foley* v. *Shriver*, 81 Va. 568; *Ackerley* v. *Commercial Credit Company*, 111 Fed. Supp. 92; *Surplus Trading Company* v. *Cook*, 281 U. S. 647 and *Mater* v. *Holley et al*, 200 Fed. 2d 123. "It necessarily follows that a state and the subordinate taxing units thereof are without power to subject to taxation the property of the Federal Government or the means, instrumentalities and agencies thereof which it employs to carry out its proper functions, unless Congress expressly confers a right upon the state to tax such agencies, instrumentalities or property." 51 Am. Jr. page 279. Thus it is seen that the leased land, being owned in fee simple by the United States and over which it exercises exclusive jurisdiction cannot be reached by assessment for the purpose of taxation by the state or any political subdivision thereof. "A state's power of taxation, however vast in its character and searching in its extent, is confined to subjects which are within its jurisdiction, and the tax laws of a state can have no extraterritorial operation." 51 Am. Jur. page 88.

However, from the terms of the lease itself and from the explicit provisions of the statute (Title 34-522e

U.S.C.A.) we find that the Congress of the United States has expressly consented to the taxation of the lessee's interest. As succinctly stated by the highest court of the State of Maryland in the case of *Meade Heights, Incorporated, et al* v. *State Tax Commission,* 95 Atlantic (Maryland) 280, "In the instant case, Congress has definitely consented to the taxation of the lessee's interest, *whatever that may be.*" (*Underscoring supplied*). It would seem imperative to comment upon the latter case in some detail because the same circumstances were there involved and substantially the same contentions there made as here.

There the appellant corporations leased five parcels of land from the United States and constructed apartment projects thereon; the land in each case being located within military and other reservations over which the United States exercised exclusive jurisdiction. The County Commissioners of Anne Arundel and Hartford Counties assessed the appellants for taxation, both as to the land and buildings. On appeal, the State Tax Commission reversed the assessments as to the land but sustained them as to the buildings. There, the lease was made under the authority of Public Law 364 (Title 10 U.S.C.A. 1270), Section 1270d provides as does Section 522e of Title 34, for the taxation of the Lessee's interest. The lease for Maryland land was for a like duration of seventy-five years but it differs from the one at hand in that it contained express provision that title to all of the improvements erected on the land should be and remain in the lessee and that, upon termination of the lease, the lessee should have the right to remove the improvements if it so desired. The State Tax Commission and the trial court held that the appellants had the only substantial interest in the buildings so erected and could be assessed with the full value thereof. The appellant

contended that it did not hold complete interest in the buildings and that an assessment measured by their full value went beyond the permissible limits of state taxation as fixed by Congress, and that Maryland law did not authorize the taxation of any interest in property less than a fee simple interest. The first contention was supported by the United States as an intervening party.

It was pointed out by the court that under the laws of Maryland the owner of a leasehold could be assessed and taxed on the full value of the improvements which it erected even though the fee was tax exempt. Section 7 (1) Article 81 of the Code of Maryland of 1951 provides for the assessment to the owner and taxation for ordinary taxes of "All real property in this state, by whomever owned, including that owned by the United States, or any department or agency of the United States, to the fullest extent possible under the Constitution of the United States and the laws of the United States pursuant thereto and in conformity therewith." Section 3(c) of the same Article provides that "the owner of certain limited interests in real estate and personal property shall be treated as the owner in fee for the purposes of taxation." Section 2(12) of the same Article provides that "Real Estate shall include leaseholds, unless such construction would be unreasonable."

The appellants argued that the retention of control by the United States in the form of agreements not to sublease except to military personnel and at approved rental figures constituted interests belonging to the Government which should have been excluded from assessment. On that point the court had this to say: "Under the terms of the lease, we think that the Government has committed itself to the legal proposition that title to the buildings is in the lessee." It was further stated that the "Lessee's interest referred to in the federal statute is described in

the lease as the 'leasehold interest' and the tax contemplated by the statute is referred to in the lease as a tax upon the leased property. The interest to the taxation of which Congress has consented is a property interest and the fact that it is not wholly free from restrictions as to use does not detract from the quality of the legal estate in the lessee and render it immune from taxation." Finally, it was held that the most that could be claimed was that the assessment was too high because the valuation did not take into consideration the possible diminution in value due to the restrictions upon the use.

While exceedingly helpful I do not consider the opinion of the Maryland court decisive of the issues here presented because of what it revealed by the pertinent taxation statutes of Maryland and because of the difference of language of the two leases with respect to title to the improvements erected on the leased property. Counsel for Prince William County contends that by virtue of Paragraph Eleven of the lease under consideration only such replacements as may be made on the leased property remaining upon the expiration of the lease shall remain on the leased premises and be the property of the Government without compensation and that any improvements erected and not replaced are owned in fee and may be removed by the lessee. I am constrained to disagree with this conclusion as the terms of the Maryland lease and also the Fort Belvoir lease referred to by counsel for both parties hereto obviously cannot have the same intended meaning. If the lease at hand had contemplated that title to the improvements should be and remain in the lessee with a right on its part to remove the same upon the expiration of the term I can perceive no reason why it should not have so stated in clear unambiguous language. This lease provides that upon its expiration or earlier termination "all improvements made upon the

leased premises *and* all ranges, refrigerators, screens, shades and other items required to be furnished with the improvements . . . shall remain on the leased premises and be the property of the Government without compensation; . . . ". The provision for the replacement of "*any such items*" manifestly refers to such items as ranges, refrigerators, screens, shades and the like as distinguished from the buildings themselves. For example, suppose that during the term of the lease a refrigerator has to be replaced does the applicant have to turn the old refrigerator over to the United States? Obviously not. He may replace the old one with a new one but the refrigerator in place at the termination of the lease becomes the property of the Government. It is my opinion that the title to the improvements themselves is vested in fee simple in the United States of America subject to the leasehold interest of the applicant, which is the right on the applicant's part to use the land and buildings during the term of the lease, subject to the conditions and restrictions therein contained.

Supplementing the expressed provision of the lease to the effect that the improvements shall remain on the premises and be the property of the Government we find the following statement contained in 11 Michie's Jurisprudence, page 729:

> "Where the terms of a lease require the lessee to erect buildings upon the leased premises, and there is no agreement for their removal by the lessee, he has no right to remove them. And the general rule is that buildings form a part of the freehold, and cannot be removed by the tenant at the end of his lease. A fortiori, where the lease in terms provides that the lessee shall surrender the buildings upon the premises at the termination of the lease, in the absence of ambiguity and allegation of fraud or mistake, this must govern."

In the case of *People* v. *Barker*, 153 N. Y. 98, it was held that a shed erected by a lessee upon property leased from the city of New York, under a lease requiring its erection and providing that it is "to become the property of the city on the expiration of the lease," became the property of the city on being erected and affixed to the realty. It was further therein held that the same was not assessable for taxation as property of the lessee.

The case before us, in which the applicant has a leasehold interest for a fixed period of years presents, I believe, a different situation than that confronting the court in the case of *City of Norfolk* v. *Perry Company et al*, 108 Va. 28. There involved was a lease of land from the then Borough of Norfolk for a period of ninety-nine years, renewable forever. Contained in the lease was a provision that the lessee covenants for himself, his executors and assigns, to "pay or cause to be paid to the person or persons authorized to receive the same the public taxes which shall become due on said land." The appellees erected buildings on the land and were, in the year 1906, assessed for taxation as to both land and buildings. It is interesting to note that the land was assessed in the name of the city and the buildings assessed in the name of the appellees. In upholding the validity of the assessment the court had this to say. "It is true that, as a general rule, in the absence of a covenant, the landlord under an ordinary lease is responsible for taxes on the property leased by him; but this general rule can have no application to the case of a perpetual leaseholder, where the tenant is in effect the virtual owner of the property and entitled to its use forever." The appellees further contended that the buildings could not be assessed separately in their names, but that the land and buildings should be assessed together in the name of the lessor. While not passing on the validity of this mode of assess-

ment the court had this to say about it: "If it were conceded that the mode of assessment adopted was wrong, and that suggested by the appellees proper, it would be harmless error. If having both the land and the buildings assessed in the name of the lessor, be of advantage to the appellees, and they have the right to have them so assessed, their remedy at law, by motion, is adequate to have the assessment corrected in that particular."

It seems to me that throughout the entire consideration of the matter before us it must be constantly borne in mind that the applicant has been assessed with real estate taxes on the improvements erected in the same manner that he would have been had he been the fee simple owner of the real estate on which said improvements were erected and that he has not been assessed with this leasehold interest. It would, however, serve no useful purpose to resolve the issue here presented solely on the ground that the improvements are a part of the real estate; that both the real estate and improvements thereon are owned in fee by the United States of America; that the Congress of the United States has not given its consent, either expressly or impliedly, to the taxation of its property by state or local governments but has only consented to the taxation of the lessee's interest. I believe it to be incumbent to also inquire and resolve whether or not, under the present laws of this Commonwealth, a leasehold interest can be assessed for taxation to the holder of the lease and whether such leasehold assessment can be classified as real estate.

It would appear that the General Assembly of Virginia at the 1954 Session thereof had some misgivings on the subject for Section 58-758 of the Code of Virginia of 1950 was amended and reenacted thus:

"Title 58-758: All taxable real estate having been

segregated by law for local taxation only, such taxable real estate shall be assessed for local taxation in accordance with the provisions of this chapter and other provisions of law. *For the purpose of this chapter, and other provisions of law relating to the assessment of real estate for taxation, the term 'taxable real estate' shall include a leasehold interest in every case in which the land or improvements, or both, as the case may be, are exempt from taxation to the owner.* This chapter shall not apply to the assessment of any real estate assessable under the law by the State Corporation Commission. *This section, as hereby amended, shall apply to the tax year beginning January first, nineteen hundred and fifty-five, and to every tax year thereafter until otherwise provided by law.*"

The amendment to the foregoing statute appears as the portions therein *underscored*. I have been unable to find any reference to a leasehold interest in any statute relating to taxation prior to the amendment to the statute set forth above. However, in Title 1-13 of the Code providing for rules of construction we see the words "land" and "real estate" defined as follows:

> "Title 1-13.12. Land, real estate.—The word 'land' or 'lands' and the words 'real estate' shall be construed to include lands, tenements and hereditaments, and all rights and appurtenances thereto and interests therein, other than a chattel interest."

The words "and appurtenances" were inserted in the statute by the amendment of 1950. Also defined in the same Title is "personal estate" and it is defined therein as follows:

> "Title 1-13.20. Personal estate.—The words 'personal estate' shall include chattels real and such other estate as, upon the death of the owner intestate, would devolve upon his personal representative."

In Michie's Jurisprudence, Volume 11, page 635, it is stated:

> "A leasehold, separate from the fee from which it has been carved, is property which the law recognizes as a thing of value, but is incorporeal and infangible in its nature."

and in Minor on Real Property, Volume I, Section 357, there appears the following statement:

> "Estates for years are chattels real, and, upon the death of the owner intestate, go to his personal representative, and not to his heir, while a freehold estate, independently of statute, never goes to the owner's personal representative."

In West Virginia the law is well settled that leasehold estates are taxable as such but they are there taxed as intangible personal property for reason that they are chattels real. *Harvey Coal and Coke Company* v. *Dillon, et al.* 53 S. E. (West Va.) 928; *Greene Line Terminal Company* v. *Martin, Assessor, et al.* 10 S. E. 2d (West Va.) 901. The case of *Harvey Coal and Coke Company* v. *Dillon et al., supra,* contains a most comprehensive discussion as to the character and nature of leasehold estates.

At the sixth page of his reply brief, counsel for the county seems to be of the opinion that the assessment should appear on the personal property books rather than the land books for he has this to say: "It may well be that the technically correct assessment in this case should have been against the 'United States Government' or the 'Contracting Officer,' since Congress has consented to the tax and has set up machinery for effectuating imposition of such a tax. If the correct assessment should be against the 'United States of America' as long as this lease is in force, then it isn't too late to make that correction; the tax is already paid and no hardship will fall on anyone. Probably, the assessments should be changed so they will

be on tangible personal property and taken out of the 'land book.' This can easily be done."

If the leasehold interest here involved properly comes under the classification of tangible personal property then I would agree with the conclusion above for the remedy of the applicant would not be by way of seeking exoneration of taxes but he would be left to his remedy of having the assessment corrected in that particular. Further, if it complains that the assessment is too high in that it does not take into consideration various elements which should be considered in making the assessment, there also the applicant would have a proper and adequate remedy.

However, I have been unsuccessful in attempting to arrive at a conclusion which would permit the assessment to be classified as tangible personal property taxable under the applicable statutes by the localities. Instead, it seems inescapable that the lessee's leasehold interest is properly to be classified as intangible personal property and, as such, taxable by the State. Title 58-405, Code of Virginia of 1950. Even then it becomes an interesting question as to whether the present laws are sufficiently broad to permit the assessment on the basis of intangible personalty for as said by the Court of Appeals in *Willis* v. *Commonwealth*, 97 Va. 667, "It is not the province or within the power of the court to make assessment. No property can be assessed with taxes until the legislature has made proper provision for this purpose."

In reaching this conclusion I am not unmindful of the fact that were the imposition of the tax to be sustained no pecuniary loss would be suffered by the United States nor do I believe that the applicant would suffer from the payment of the taxes. I would assume that the lease would be renegotiated in order to take into consideration the taxes paid and an increase in rents would probably ensue.

This conclusion, however, cannot be permitted to play any part in the determination of the issues presented in the light of what I believe to be the law.

It follows that this court must enter an order declaring the assessment erroneous and directing the Treasurer of Prince William County, Virginia, to refund to the applicant the amount of the taxes paid by it under protest for the years 1952 and 1953.

.....

Judge.

E.

STATUTES INVOLVED.

1. The Wherry Military Housing Act of August 8, 1949, 63 Stat. 570, 12 U. S. C. § 1748, which added Title VIII—Military Housing Insurance to the National Housing Act. The pertinent provisions read as follows:

> "Sec. 803. (a) In order to assist in relieving the acute shortage of housing which now exists at or in areas adjacent to military installations because of uncertainty as to the permanency of such installations and to increase the supply of rental housing accommodations available to military and civilian personnel at such installations, the Commissioner is authorized, upon application of the mortgagee, to insure mortgages (including advances on such mortgages during construction) which are eligible for insurance as hereinafter provided, and, upon such terms as the Commissioner may prescribe, to make commitments for so insuring such mortgages prior to the date of their execution or disbursement thereon: *Provided*, That the aggregate amount of principal obligations of all mortgages insured under this title shall not exceed $500,000,000 except that with the approval of the President such aggregate amount may be increased to

not to exceed $1,000,000,000: *And provided further*, That no mortgage shall be insured under this title after July 1, 1951, except (A) pursuant to a commitment to insure issued on or before such date, or (B) a mortgage given to refinance an existing mortgage insured under this title and which does not exceed the original principal amount and unexpired term of such existing mortgage.

"(b) To be eligible for insurance under this title a mortgage shall meet the following conditions:

"(1). The mortgaged property shall be held by a mortgagor approved by the Commissioner. The Commissioner may, in his discretion, require such mortgagor to be regulated or restricted as to rents or sales, charges, capital structure, rate of return, and methods of operation. The Commissioner may make such contracts with, and acquire for not to exceed $100 stock or interest in, any such mortgagor, as the Commissioner may deem necessary to render effective such restriction or regulation. Such stock or interest shall be paid for out of the Military Housing Insurance Fund, and shall be redeemed by the mortgagor at par upon the termination of all obligations of the Commissioner under the insurance.

"(2) The mortgaged property shall be designed for rent for residential use by civilian or military personnel of the Army, Navy, Marine Corps, or Air Force (including Government contractors' employees) assigned to duty at the military installation at or in the area of which such property is constructed. Notwithstanding the provisions of any other law, preference or priority of opportunity in the occupancy of the mortgaged property for such personnel and their immediate families shall be provided under such regulations and procedures as may be prescribed by the Commissioner. No mortgage shall be insured under this title unless the Secretary of Defense or his designee shall have certified to the Commissioner that the housing with respect to which the mortgage is made is necessary to provide adequate housing for such personnel, that such installation is deemed to be a

permanent part of the Military Establishment, and that there is no present intention to substantially curtail activities at such installation.

"(3) The mortgage shall involve a principal obligation in an amount—

"(A) not to exceed $5,000,000; and

"(B) not to exceed 90 per centum of the amount which the Commissioner estimates will be the replacement cost of the property or project when the proposed improvements are completed; and

"(C) not to exceed an average of $8,100 per family unit for such part of such property or project as may be attributable to dwelling use, except that where the Secretary of Defense or his designee in exceptional cases certifies and the Commissioner concurs in such certification that the needs would be better served by single-family detached dwelling units the mortgage may involve a principal obligation not to exceed $9,000 per family unit for such part of such property as may be attributable to such dwelling units.

* * * * *

"Sec. 805. Whenever the Secretary of the Army, Navy, or Air Force determines that it is desirable to lease real property within the meaning of the Act of August 5, 1947 (61 Stat. 774), to effectuate the purposes of this title, the Secretary concerned is authorized to lease such property under the authority of said Act upon such terms and conditions as in his opinion will best serve the national interest without regard to the limitations imposed by said Act in respect to the term or duration of the lease, and the power vested in the Secretary of the Department concerned to revoke any lease made pursuant to said Act in the event of a national emergency declared by the President shall not apply. Whenever the Secretary of the Army, Navy, or Air Force determines it to be in the interest of national defense, he is hereby authorized to sell, transfer, and convey at fair value (as determined by him), for use under this title, all or any right, title, and interest in any real property under his jurisdiction, notwithstanding any limita-

tions or requirements of law with respect to the use or disposition of such property. The authority conferred by this section shall be in addition to and not in derogation of any other power or authority of the Secretary of the Army, Navy, or Air Force.

* * * * * * *

"Sec. 807. Nothing in this title shall be construed to exempt any real property acquired and held by the Commissioner under this title from taxation by any State or political subdivision thereof, to the same extent, according to its value, as other real property is taxed."

2. Military Leasing Act of August 5, 1947, 61 Stat. 774, 5 U. S. C. § 626s.

"[Section 1] * * * whenever the Secretary of War or the Secretary of the Navy [or the Secretary of the Air Force] shall deem it to be advantageous to the Government he is authorized to lease such real or personal property under the control of his Department as is not surplus to the needs of the Department within the meaning of the Act of October 3, 1944 (58 Stat. 765), and is not for the time required for public use, to such lessee or lessees and upon such terms and conditions as in his judgment will promote the national defense or will be in the public interest. Each such lease shall be for a period not exceeding five years unless the Secretary of the Department concerned shall determine that a longer period will promote the national defense or will be in the public interest. The Secretary of the Department concerned may include, among other terms and conditions in the lease, a right of first refusal in the lessee to purchase the property in the event of the revocation of the lease in order to permit sale thereof by the Government, but this section shall not be construed as authorizing the sale of any property unless the sale thereof is otherwise authorized by law. Each such lease shall contain a provision permitting the Secretary of the Department concerned to revoke the lease at any time, unless the Secretary shall determine that the omission of such provision

from the lease will promote the national defense or will be in the public interest. In any event each such lease shall be revocable by the Secretary of the Department concerned during a national emergency declared by the President. Notwithstanding section 321 of the Act of June 30, 1932 (47 Stat. 412; U. S. C., title 40, sec. 303b), or any other provision of law, any such lease may provide for the maintenance, protection, repair, or restoration by the lessee, of the property leased or of the entire unit or installation where a substantial part thereof is leased, as a part or all of the consideration for the lease of such property. In the event utilities or services shall be furnished by the Department concerned to the lessee in connection with any lease, payments for utilities or services so furnished may be covered into the Treasury to the credit of the appropriation or appropriations from which the costs of furnishing any such utilities or services to the lessee was paid. Except as otherwise hereinabove provided, any money rentals received by the Government directly under any such lease shall be deposited and covered into the Treasury as miscellaneous receipts. The authority herein granted shall not apply to oil, mineral, or phosphate lands. The Secretary of War or the Secretary of the Navy, as the case may be, shall submit to the Congress on the 1st day of January and the 1st day of July of each year, following the enactment of this law, a report of all leases entered into in accordance with the provisions of this Act.

"Sec. 5. (a) Whenever in the opinion of the Secretary of War or the Secretary of the Navy, as the case may be, the interests of national defense require assurance of the continued availability for war-production purposes of the industrial capacity of shipyards, plants, and equipment which are surplus to the needs of their respective Departments or of the Reconstruction Finance Corporation within the meaning of the Surplus Property Act of 1944, they are authorized to direct the imposition of such terms, conditions, restrictions, and reservations in the disposition of such property by the disposal agency under said Act as will in the opinion of the Secretary concerned be adequate to assure such continued availability.

(b) In the event the disposal agency is unable to dispose of any such industrial plants and equipment subject to such terms, conditions, restrictions, or reservations as have been imposed, within a reasonable time and after such property shall have been offered for sale and reasonable efforts made to dispose of the same, the Department imposing such terms, conditions, restrictions, or reservations shall (1) modify them to the extent necessary to permit the sale or lease of such property, (2) withdraw the property from surplus, or, in the case of Reconstruction Finance Corporation property, request a transfer thereof in the manner provided in sections 3 (a) and 4 of this Act, or (3) eliminate and waive the requirement for the imposition of any terms, conditions, restrictions, or reservations made under the authority of this section.

"Sec. 6. The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of this Act shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated."

3. Housing Amendments of 1955, Public Law No. 345, Ch. 783, 84th Cong. 1st Sess., Approved August 11, 1955. Title VIII of the National Housing Act was amended to read as follows:

"Sec. 803. (a) In order to assist in relieving the acute shortage and urgent need for family housing which now exists at or in areas adjacent to military installations because of uncertainty as to the permanency of such installations and to increase the supply of necessary family housing accommodations for personnel at such installations, the Commissioner is authorized, upon application of the mortgagee, to insure mortgages (including advances on such mortgages during construction) which are eligible for insurance as hereinafter provided, and, upon such terms as the Commissioner may prescribe, to make commitments for so insuring such mortgages prior to the date of their execution or disbursement thereon: *Provided,* That the aggregate amount of principal obligations of all mortgages insured under this title shall not exceed $1,363,500,000: *And provided further,* That the limitation in section 217 of this Act shall not apply to this title: *And provided further,* That no mortgage shall be insured under this title after September 30, 1956, except pursuant to a commitment to insure issued before such date.

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"Sec. 805. Whenever the Secretary of the Army, Navy, or Air Force determines that it is necessary to lease any land held by the United States on or near a military installation to effectuate the purposes of this title, he may lease such land upon such terms and conditions as will, in his opinion, best serve the national interest. The authority conferred by this section shall be in addition to and not in derogation of any other power or authority of the Secretary of the Army, Navy, or Air Force.

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"Sec. 807. The Commissioner is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this title. In the performance of, and with respect to, the functions, powers, and duties vested in him by this title, the Commissioner, notwithstanding the provisions of any other law, shall appoint a Special Assistant for Armed Services Housing for Mortgage Insurance, and provide the Special Assistant with adequate staff, whose whole responsibility will be to expedite operations under this title and to eliminate administrative obstacles to the full utilization of this title under the direction and supervision of the Commissioner."

The 1955 statute contains the following savings provision:

"Sec. 408. Notwithstanding the provisions of section 401 of this Act, the provisions of title VIII of the National Housing Act in effect prior to the enactment of the Housing Amendments of 1955 shall continue in full force and effect with respect to all mortgages insured pursuant to a certification by the Secretary of Defense or his designee made on or before June 30, 1955, and a commitment to insure issued on or before June 30, 1956 or pursuant to a certification by the Atomic Energy Commission or its designee made on or before June 30, 1956, except that the maximum dollar amount for each such mortgage shall be $12,500,000."